(36,695)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 40

BERNARD L. SHAPIRO, PETITIONER,

vs.

HORACE B. WILGUS AND DAVID BACHMAN, RECEIVERS OF MILLER ROBINSON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DECEMBER TERM, 1930

No. 6377

JOHN N. MCLEAN and HERBERT P. ROBINSON

vs.

MILLER ROBINSON COMPANY

DOCKET ENTRIES

Jacob Weinstein for B. L. Shapiro.
Sidney E. Smith for Receivers.

Jan. 12, 1931.—Bill of Complaint filed.
Jan. 12, 1931.—Answer filed.
Jan. 12, 1931.—Decree appointing John I. Coulbourn and David Bachman Receivers filed.
Jan. 12, 1931.—Bond of Receivers, with Massachusetts Bonding & Insurance Company surety, in $25000, and Decree approving same filed.
Jan. 13, 1931.—Appearance of S. E. Smith, Esq., for Receivers filed.
Jan. 13, 1931.—Petition of John I. Coulbourn to be discharged as Receiver filed.
Jan. 13, 1931.—Decree appointing H. B. Wilgus Receiver in place of John I. Coulbourn, and discharging John I. Coulbourn as Receiver, filed.
Jan. 15, 1931.—Decree appointing Appraisers filed.
Jan. 15, 1931.—Bond of Receivers in $25,000 with Massachusetts Bonding and Insurance Company surety, and Decree approving same filed.
[fol. 2] Feb. 10, 1931.—Appearance of S. E. Smith, Esq., for H. B. Wilgus and D. Bachman, Receivers, filed.
Feb. 26, 1931.—Petition of B. L. Shapiro for leave to issue execution and Decree granting order on Receivers to show cause why execution should not issue filed.
Feb. 27, 1931.—Appraisement filed.

Mar. 4, 1931.—Answer by Receivers to petition for leave to issue execution filed.

Mar. 10, 1931.—Petition for and Decree granting leave to issue Receivers' Certificates filed.

Mar. 10, 1931, Argued sur petition for leave to issue execution.

Mar. 12, 1931.—Order of Court denying petition for leave to issue execution filed.

Mar. 19, 1931.—Petition by South Atlantic Lumber Company for leave to levy certain goods, etc., filed.

Mar. 23, 1931.—Answer by Receivers to petition by South Atlantic Lumber Company filed.

Apr. 1, 1931.—Opinion, Kirkpatrick, J., dismissing petition by South Atlantic Lumber Co., filed.

Apr. 14, 1931.—Assignments of Error filed.

Apr. 14, 1931.—Petition for appeal by B. L. Shapiro and Decree allowing appeal filed.

Apr. 14, 1931.—Præcipe for transcript of record sur appeal filed.

Apr. 22, 1931.—Decree dismissing petition of South Atlantic Lumber Company for leave to issue execution filed. [fol. 3] Apr. 25, 1931.—Copy of Notice of Appeal by B. L. Shapiro filed.

Apr. 27, 1931.—Citation returned with affidavit as to service endorsed thereon, and filed.

IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed Jan. 12, 1931

To the Honorable, the Judges of said Court:

John N. McLean and Herbert P. Robinson, bring this their Bill of Complaint and complain as follows:

1. Your complainant, John N. McLean is a citizen of the State of Pennsylvania and resides at Melrose Park, Montgomery County, Pennsylvania.

2. Your complainant, Herbert P. Robinson, is a citizen of the State of Pennsylvania and resides at Noble, Montgomery County, Pennsylvania.

3. Miller Robinson Company is a corporation chartered under the laws of the State of Delaware, having a place of business in the City of Philadelphia, State of Pennsylvania.

4. The amount involved in this controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

5. Your complainant, John N. McLean, is a creditor of said respondent on a promissory note for money lent and advanced and liability for which was duly assumed by said respondent and for which and by reason of which respondent is indebted to and owes said complainant the sum of Eight Thousand Dollars ($8,000.00).

[fol. 4] 6. Your complainant, Herbert P. Robinson is the holder of 990 shares of the capital stock of respondent of the par value of Ninety-nine Thousand Dollars ($99,000.00).

7. Said respondent has outstanding capital stock of the par value of One Hundred Thousand Dollars ($100,000.00) and is engaged in the business of the manufacture and sale at wholesale and retail of lumber and millwork.

8. On or about January 10, 1931, respondent owned assets worth, according to its books, the sum of $274,315.82, which assets your complainants believe and therefore aver are, making allowance for reasonable and probable deductions and depreciations, of a just and fair valuation of not less than $274,315.82, and had actual liabilities approximating but not exceeding, as your complainants are informed and believe and therefore aver, the sum of $175,746.59, and was then and there solvent in that its assets greatly exceeded its liabilities at fair valuation. A statement of said company as of January 10, 1931, as the same appears upon the books of respondent is attached hereto, made part hereof and marked "Exhibit A."

9. Complainants aver that the indebtedness of the respondent is represented by open accounts, unsecured obligations in writing, notes, mortgages on real estate, all of which appears in said statement hereto attached. Complainants aver that some of the indebtedness of respondent on open accounts and notes has matured; that others are about to mature; that said respondent while amply solvent

is temporarily embarrassed and if its business can be maintained and continued said respondent will be able to pay in full all indebtedness and the business and its assets saved for the stockholders.

[fol. 5] 10. Complainants aver that some of the creditors to whom respondent is indebted are pressing for immediate payment of their claims; that one has entered suit and threatens to proceed to judgment and execution, that there is great danger of other suits and levies on the property of respondent; that such actions if pursued will result in the sale of the assets of the corporation so that the plant and property thereof will be disintegrated with the consequent impossibility of conducting the business of the respondent.

11. Complainants aver and charge the fact to be that by reason of the foregoing there is great and immediate danger that the assets and property of said respondent will be attached, and levied upon and sold separately by its various creditors; that if through any such execution or foreclosure the assets and property of the respondent are sold, a large part of such assets will inevitably be lost and the business and good will of the respondent will be ruined to the great detriment and damage of the creditors and stockholders of respondent; that if, however, the business of said respondent can be continued and its assets and property protected from levy, the net proceeds will be greatly increased, the moneys and property of the stockholders protected and the best interest of all concerned thereby conserved; that unless the relief hereinafter prayed for be granted, great and irrevocable injury and damage will be caused to complainants and to the creditors of said respondent, as well as to said respondent and its stockholders, and great and unnecessary sacrifice, injury and loss to the rights of the creditors and stockholders will result.

12. Complainants aver that this action is not brought about by any collusion on the part of your complainants or [fol. 6] either of them, either to confer upon this Court jurisdiction of a case of which it would not otherwise have cognizance, or otherwise.

13. In consideration whereof and forasmuch as your complainants are without adequate remedy at law in the premises and therefore require the assistance of a Court of

Equity, where matters of this nature are particularly cognizable and relievable, your complainants pray that a receiver or receivers be appointed according to the form of the statutes in such case made and provided for and of all and singular the business, property and assets of every nature, wheresoever situated, held, owned and controlled by the respondent corporation, with the full power to take into their possession, hold, manage and operate the same under the direction of this Court, with such powers as the Court may, from time to time, grant; to incur such expenses as may be necessary or advisable in connection therewith; to purchase for cash or on credit such supplies, materials or other property as may be necessary or advisable in connection with the administration of the business and assets of the respondent corporation; to sell the merchandise of the respondent corporation, either for cash or credit as said receiver or receivers may deem advisable; to bring suit, or collect, receive and take into their possession all of the property and assets, real or personal, goods, chattels, credits, rights, claims and effects, books, paper and all other property whatsoever, and wheresoever situate of the respondent corporation, to institute, prosecute, become parties to, intervene in, compromise, or defend such suits and actions at law or in equity, for the recovery of or the protection or maintenance of any of the property and assets of the respondent corporation as they may deem necessary or [fol. 7] proper; to settle or compound all or any debts that may be due or owing to said company, as they may deem advisable or proper; subject to the further authorization of this Honorable Court, to pay any such claims for wages or otherwise, as may be decreed by this Court to be entitled to priority; and with the other usual powers of receivers in such cases; and that the officers, managers, superintendents, agents and employees of the said respondent corporation be required forthwith to deliver up to the said receiver or receivers possession of all or every part of the several properties of the respondent corporation, wherever situate, and also the several books, vouchers and papers in any way relating to the business of the said respondent corporation; and that your complainants may have such further or other relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience.

May it please this Honorable Court, the premises considered, to grant unto your complainants the writ of injunction issuing out of and under the seal of this Honorable Court, directed to Miller Robinson Company, its officers, servants and agents, enjoining and restraining them and each of them from exercising any of the privileges or franchises granted by the Act incorporating said company and from collecting or receiving any debts due said corporation and from paying out, selling, assigning or transferring any of the assets, moneys, funds, lands, tenements or effects of said corporation, and also the writ of subpœna of the United States of America likewise issuing out of and under the seal of this Honorable Court to be directed to Miller Robinson Company therein and thereby commanding it to appear before this Honorable Court, according to law and the course of this [fol. 8] Court, at a certain day and under certain penalty therein to be expressed, then and there to answer the premises and to stand to, abide and perform such decrees as your Honorable Court shall seem meet.

May it please this Honorable Court, the premises considered to grant an order enjoining and restraining all persons, firms and corporations from suing the defendant, levying execution upon, attaching, seizing, intermeddling with or taking possession of any of the property of defendant, without leave of your Honorable Court.

14. Such other and further relief as your Honorable Court may deem proper.

And your complainants will ever pray, etc.

Sidney E. Smith, Solicitor for Complainants.

EXHIBIT "A" TO BILL OF COMPLAINT

Assets

Cash on hand	$3,000.00
Accounts Receivable	16,537.41
Notes Receivable	1,200.00
Building and Loan	2,408.15
Land	100,000.00
Equities in real estate	44,235.00
Inventory	52,338.19
Other assets	54,597.07
	$274,315.82

Liabilities

Accounts Payable, mdse.	$7,280.29
Accounts Payable, sundries	1,659.54
Notes Payable, banks	135,950.00
[fol. 9] Notes Payable, Comm.	30,856.76
	$175,746.59

Duly sworn to by John N. McLean and Herbert P. Robinson. Jurat omitted in printing.

[fol. 10] In United States District Court

Answer—Filed Jan. 12, 1931

To the Honorable the Judges of the said Court:

The Answer of Miller Robinson Company to the Bill of Complaint filed in the above case respectfully represents:

1. The respondent admits the averments contained in the aforesaid Bill.

2. The respondent therefore joins in the prayer of the complainants that a receiver or receivers be appointed for it, and further submits itself to such order and decrees as your Honorable Court may deem meet and proper to enter in the premises.

Miller Robinson Company, by Wood Robinson, Secretary and Treasurer.

Resolution

Certified Copy of Resolution Adopted at Meeting of the Board of Directors of Miller Robinson Company

January 12, 1931.

Whereas Miller Robinson Company is being pressed by current merchandise creditors whose claims said corporation although solvent is unable by reason of absence of quick assets to meet;

And whereas the Directors of said corporation have been informed that a Bill in Equity praying for the appoint-

ment of a receiver is about to be applied for in the United States District Court for the Eastern District of Pennsylvania,

[fol. 11] Upon motion duly seconded and carried, the officers of the said corporation are hereby authorized and empowered to execute an Answer to said Bill in Equity, and join in the prayer for a receiver.

Wood Robinson, Secretary and Treasurer.

I hereby certify the foregoing to be a true and accurate copy of Resolution this day passed by the Board of Directors of Miller Robinson Company.

Wood Robinson, Secretary.

Duly sworn to by Wood Robinson. Jurat omitted in printing.

[fol. 12] IN UNITED STATES DISTRICT COURT

DECREE APPOINTING RECEIVERS—Filed Jan. 12, 1931

And Now, to wit, this 12th day of January, 1931, this cause coming on to be heard, upon consideration of the Bill filed herein and Answer thereto, and on motion of Sidney E. Smith, Esq., it is ordered and decreed that John I. Coulbourn and David Bachman are hereby appointed receivers of all the assets, property, franchises, rights and privileges of whatsoever kind of Miller Robinson Company, within the jurisdiction of this Court, with power to take, hold, demand, sue for, receive and collect all the funds, assets and property belonging to Miller Robinson Company, or in the hands of any debtor, officer, employee, agent, or depository of said Miller Robinson Company and to account to the Court for the same; and all debtors, officers, employees, agents and depositories of said Miller Robinson Company are hereby directed to forthwith pay, deliver and assign all money, securities, assets, and property of every kind whatsoever to said receiver. The said receivers are hereby empowered to bring, prosecute and defend all suits, at law or in equity which in their judgment may seem necessary for the preservation and protection of the property and interests under their control and care; the said receivers shall file an inventory and

appraisement of the property committed to their custody, and shall file their account therefor, and shall distribute the same according to law to the persons entitled thereto, with such other powers as may be necessary and incident to protect the rights and interests of all parties concerned; said receivers to enter security in the sum of $25,000 and Massachusetts Bonding and Insurance Company is hereby approved as such security.

[fol. 13] It is further ordered and decreed that said Miller Robinson Company and its officers, agents and employees are hereby enjoined from retaining or taking possession of the money, or retaining, taking, delivering or assigning any of the assets or property, franchises, rights and privileges of said Miller Robinson Company and from collecting or receiving any of the money, assets, securities or property of said Miller Robinson Company, or in any wise dealing therewith or molesting or interfering with the full and absolute possession or control, possession and/or control thereof by said receiver.

It is further ordered and decreed that said receivers be and are hereby given authority to continue the business of said Miller Robinson Company in its usual course, for the period of six months from the date hereof or until the further order of the Court, with full power to take into their possession, hold, manage and operate the same under the direction of this Court, with such further and additional powers as the Court may, from time to time, grant; said receivers shall have the authority and power to incur and pay such expenses as may be necessary or advisable in connection therewith; to purchase for cash or credit such supplies, materials or other property as may be necessary or advisable in connection with the administration and the operation of the business and assets of said Miller Robinson Company; to manufacture and sell the merchandise of the respondent corporation either for cash or credit as said receivers may deem advisable; to institute, prosecute, become parties to, intervene in, compromise or defend such suits and actions at law or in equity for the recovery and/or the maintenance of any of the property and assets of the respondent corporation as they may deem necessary [fol. 14] or proper; to settle or compound all or any debts that may be due or owing to said company, as they deem advisable or proper; subject to the further authorization of

the Court to pay such claims for wages or otherwise, as may be decreed by this Court as entitled to priority.

It is further ordered and decreed that the officers, managers, superintendents, agents, employees of said respondent corporation and/or other persons having any property or assets of the respondent corporation shall forthwith deliver up to the said receiver all and every part of the several properties of the respondent corporation, wherever situated, and also all books, vouchers and papers in any way relating to or connected with the business of the respondent corporation.

It is further ordered and decreed that an order issue in due and legal form enjoining and restraining all persons, firms and corporations from suing said Miller Robinson Company, levying executions upon, attaching, seizing, intermeddling with, taking and/or retaining possession of any of the property of the defendant without leave of this Court had and obtained.

Leave is hereby granted to said Receiver to apply to the Court for such further and other powers and orders as to them may seem necessary, desirable, or expedient in the cause and the particular circumstances shall require. Further ordered that said Receivers shall deposit any money coming into their hands in a designated depository approved by the Court.

By the Court:

W. H. Kirkpatrick, J.

[fol. 15] IN UNITED STATES DISTRICT COURT

ORDER APPOINTING SUBSTITUTED RECEIVER—Filed Jan. 14, 1931

And now, to wit, January 13, 1931, upon consideration of petition of John I. Coulbourn this day presented it is ordered and decreed that said John I. Coulbourn be discharged as one of the receivers of the above entitled Miller Robinson Company and his surety on the bond filed herein be relieved from all liability thereunder.

It is further ordered and decreed that Horace B. Wilgus be and he is hereby appointed receiver in place and stead of said John I. Coulbourn and that the said Horace B. Wilgus and David Bachman be and they have all the powers

and authorities contained and set forth in the order heretofore entered in the above entitled cause on the 12th day of January, 1931, in the order of original appointment of receivers.

By the Court:

W. H. Kirkpatrick, J.

IN UNITED STATES DISTRICT COURT

PETITION FOR LEAVE TO ISSUE EXECUTION—Filed Feb. 26, 1931

To the Honorable the Judges of the said District Court:

The petition of Bernard L. Shapiro respectfully represents:

1. That your petitioner is plaintiff in a certain action of assumpsit wherein Herbert P. Robinson, one of the complainants in the above entitled cause is defendant.

[fol. 16] 2. That the said action is identified and is pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, and was instituted on the 16th day of January, 1931.

3. That in due course of procedure your petitioner obtained judgment in said action against the said defendant on the fourth day of February, 1931, for the want of a defense, thereupon on the same day damages were assessed in the sum of one thousand and seven dollars and sixty-five cents ($1,007.65).

4. That said judgment is still due and unpaid.

5. That the right of action which was merged in the judgment aforesaid was for money loaned by your petitioner to the said defendant on the 22nd day of October, 1930, in the sum of one thousand dollars ($1,000.00) which the said defendant verbally agreed to repay unto your petitioner on the 19th day of December, 1930, and the said defendant having defaulted in the premises the aforesaid action was instituted against him by your petitioner culminating as above.

6. Your petitioner avers that the said defendant at the time of the procuration of the loan aforesaid from your

petitioner and for some time thereafter, as hereinafter more fully averred, was seized and possessed of great quantities of personal property and numerous parcels of real estate in the City and County of Philadelphia and elsewhere.

7. Your petitioner avers that in anticipation of the judgment aforesaid and other judgments and suits entered and to be entered against the said defendant, he, the said defendant on and before the 9th day of January, 1931, in collusion with other persons presently to your petitioner unknown, with a purpose and intent of hindering, delaying [fol. 17] and defrauding your petitioner and certain other creditors, of him, the said defendant, applied to the duly constituted authorities of the state of Delaware for the end and purpose of having said authorities duly incorporate a certain corporation under the laws of that state known and to be known as Miller Robinson Company.

8. The petitioner avers that pursuant to the plan and scheme aforesaid Miller Robinson Company was on or about the 9th day of January duly incorporated under the laws of the state of Delaware.

9. Your petitioner avers that the said corporation having been so incorporated the said Herbert P. Robinson on or about the 9th day of January, 1931, granted and conveyed all his assets real and personal as far as known to your petitioner to the said corporation, among which was the stock, fixtures, machinery, apparatus, and vehicles constituting and comprising the whole of a retail lumber yard or business located at 6th Street and Sedgley Ave., in the City and County aforesaid.

10. Your petitioner avers that pursuant to pretended grant the said corporation on said day took ostensible possession of said lumber yard and business and the chattels constituting and comprising the same.

11. Your petitioner avers that in furtherance of the fraudulent plan and scheme aforesaid more particularly referred to in paragraph 7 hereof the said corporation at the instance of the said Robinson and one John N. McLean as co-complainant in this cause was summoned as defendant which proceeding was instituted within three days of said grant to wit on or about the 12th day of January, 1931.

12. Your petitioner avers it will by reference to the records in this cause inter alia fully and at large appear that [fol. 18] by the bill of complaint filed in said cause the said Robinson and McLean averred that the said corporation that by reason of the state of its finances was unable to pay its debts though not insolvent, notwithstanding the fact of the receipt of it of all the assets both real and personal of him the said Robinson but three days previously and the fact that its corporate functions and business were in operation not more than three days.

13. Your petitioner avers that by reference to the same bill of complaint it will further inter alia at large appear that the said Robinson and McLean therein prayed that your Honorable Court should appoint receivers to take and receive the assets of the said corporation and administer the same according to the practice in equity.

14. Your petitioner further avers that by further reference to said record it will further inter alia fully and at large appear that the said corporation acting by and through its secretary and treasurer one Wood Robinson whom, your petitioner is informed and believes is the son of the said Herbert P. Robinson on or about the last mentioned date duly filed its answer in said cause, wherein and whereby it admitted all the allegations contained in said bill of complaint and submitted to any decree that your Honorable Court might elect to enter in said cause.

15. Your petitioner avers that thereupon your Honorable Court acting by and through the Honorable W. H. Kirkpatrick one of the judges thereof did on the 12th day of January, 1931, appoint John I. Coulbourn and David Bachman receivers of all the assets of the said corporation and thereafter on the 13th day of January, 1931, by supple- [fol. 19] mentary decree entered by the said Honorable W. H. Kirkpatrick, judge, revoked the appointment of the said John I. Coulbourn as receiver and discharged him from and out of said office and in his place and stead duly appointed one Horace B. Wilgus receiver of the assets of said corporation.

16. Your petitioner avers that thereafter the said Bachman and the said Wilgus duly entered their bond and qualified as receivers of the said corporation.

17. Your petitioner avers that the said receivers having so qualified, they the said receivers in a supposed and pretended right and authority on or about the last mentioned date ostensibly inter alia took and possessed themselves of the chattels and personal property mentioned and described in paragraphs 9 and 10 hereof and presently remain in ostensible possession thereof.

18. Your petitioner avers that by reason of the premises that the whole transaction hereinbefore pleaded and set forth having been initiated and prosecuted by the said Robinson and other persons unknown to your petitioner with the purpose and intent of hindering, delaying and defrauding your petitioner and others creditors of him the said Robinson similarly situated is by the law of Pennsylvania wherein the aforesaid transactions were had and took place illegal, null, void and of no effect.

19. Your petitioner avers that he is advised by counsel and therefore believes and expects to be able to prove as a matter of law that notwithstanding the illegality, nullity and invalidity of the transaction aforesaid as to him, by reason of the ostensible possession of the chattels and personal property as aforesaid by the receivers aforesaid, your petitioner is exposed to the risk of incurring a contempt of Court, in the event of setting on foot appropriate proceed-
[fol. 20] ings to test, nullify and set aside the fraudulent and illegal transaction without precedent leave of court.

20. Your petitioner avers that by the same advice he is informed and believes and expects to be able to prove as a matter of law that by the law of Pennsylvania where the aforesaid personal property and chattels presently remain the appropriate remedy to test, nullify and set aside the fraudulent transaction herein complained of is to levy upon the same and seize the same by virtue of an appropriate writ of fieri facias.

21. Your petitioner avers that unless he be permitted to exercise the legal remedy aforesaid his rights and equities in the premises will be defeated and frustrated and he will be in the peril of the loss of his judgment aforesaid.

Wherefore your petitioner prays that your Honorable Court enter an order upon David Bachman and Horace B.

Wilgus receivers in this cause requiring them and each of them to show cause why Bernard L. Shapiro the petitioner herein should not be permitted to issue a writ of fieri facias against the chattels and personal property in their possession as the same have heretofore been owned and possessed by Herbert P. Robinson in a cause pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, in which your petitioner is plaintiff and the said Herbert P. Robinson is defendant for the purpose of levying upon, seizing and selling the same so far as may be necessary to secure full satisfaction of your petitioner's judgment.

And your petitioner will ever pray, etc.

(Signed) Bernard L. Shapiro, Petitioner.

[fol. 21] *Duly sworn to by Bernard L. Shapiro. Jurat omitted in printing.*

In United States District Court

Order Granting Rule—Filed Feb. 26, 1931

Before Kirkpatrick, J.

And now, to wit, this 26th day of Feby., A. D. 1931, upon consideration of the annexed petition and upon motion of Jacob Weinstein, Esq., solicitor for Bernard L. Shapiro, petitioner, an order is hereby entered upon David Bachman and Horace B. Wilgus, receivers of Miller Robinson Company a corporation incorporated under the laws of the State of Delaware requiring them and each of them to show cause why the petitioner herein should not be permitted to issue a writ of fieri facias against the chattels and personal property in their possession as the same have heretofore been owned and possessed by Herbert P. Robinson in a cause pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, in which the petitioner is plaintiff and the said Herbert P. Robinson is defendant for the purpose of [fol. 22] levying upon, seizing and selling the same so far as may be necessary to secure full satisfaction of the petitioner's judgment. Hearing hereon to be had on the

4th day of March, A. D. 1931, at 10 o'clock a. m., in room No. 313 Post Office Building, 9th and Chestnut Streets, Philadelphia, Pa.

By the Court. Attest:

George Brodbeck, Clerk.

In United States District Court

Answer of Receivers to Petition of Bernard L. Shapiro for Leave to Issue Execution—Filed Mar. 4, 1931

To the Honorable the Judges of the said Court:

The Answer of Horace B. Wilgus and David Bachman, Receivers appointed by your Honorable Court in the above entitled case, to the petition of Bernard L. Shapiro respectfully represents:

1. Respondents are informed that the averments of paragraph 1 of the petition are true.

2. Respondents are informed that the averments of paragraph 2 of the petition are true.

3. Respondents have no knowledge as to the averments of paragraph 3 of the petition.

4. Respondents believe that the averment of paragraph 4 of said petition is true.

5. Respondents are informed that the averments of paragraph 5 are true.

6. Respondents have no definite knowledge as to the extent of the holdings of said Herbert P. Robinson as the same are averred in paragraph 6 of the petition.

[fol. 23] 7. Respondents aver that they have no knowledge of their own as to the averments in paragraph 7 of the petition. For further answer to said paragraph your respondents aver from information and belief based upon inquiry made by them that the averments of said paragraph are untrue. Respondents further aver, upon information and belief, that there was no collusion on the part of said Herbert P. Robinson with other persons or any intent on the part of said Robinson or other persons to

hinder, delay or defraud the petitioner or any other creditor of him the said Herbert P. Robinson. Respondents respectfully represent to your Honorable Court that the averments in paragraph 7 are immaterial and even if material, are not capable of proof by said petitioner.

8. Respondents are informed and believe and therefore aver that the corporation Miller Robinson Company was on the 9th day of January, 1931, duly incorporated under the laws of the State of Delaware. Respondents on information and belief deny that such corporation was formed pursuant to a plan and scheme to hinder, delay or defraud the petitioner and said other creditors of said Herbert P. Robinson.

9. Respondents on information and belief aver that by bill of sale and divers other conveyances and writings on January 9, 1931, Herbert P. Robinson did convey to the said Miller Robinson Company all his assets, real and personal, constituting the business theretofore carried on by him as a retail lumber yard at 6th and Sedgley Avenue in the City and County of Philadelphia.

10. Respondents aver on information and belief that said corporation thereupon took possession of said business and the assets comprised within the same.

[fol. 24] 11. Respondents on information deny that there was any fraudulent plan or scheme as referred to in paragraph 7 of the petition. Respondents aver that the record shows that the Bill in Equity referred to in said petition was filed on January 12, 1931.

12. Respondents admit that in and by said Bill which is filed of record in this case John N. McLean and Herbert P. Robinson averred that said corporation although solvent was not able to pay its presently accruing indebtedness. Respondents deny that there appears in said Bill the words "notwithstanding the fact of the receipt of it of all the assets both real and personal of him the said Robinson but three days previously and the fact that its corporate functions and business were in operation not more than three days."

13. Respondents admit the averments in paragraph 13 of the petition.

14. Respondents aver that the Answer filed in said proceeding did admit the allegations of the Bill and that in said Answer said Miller Robinson Company submitted itself to any decrees that your Honorable Court should enter.

15. Respondents admit the averments of paragraph 15 of the petition.

16. Respondents admit the averments of paragraph 16 of the petition.

17. Respondents aver that the Receivers having so qualified, entered and took possession of the chattels and property of said corporation but deny that they so did in any supposed or pretended right. Respondents further aver that in so doing they acted in force and authority of the decree theretofore entered by your Honorable Court.

[fol. 25] 18. Respondents on information and belief deny that the said transaction was initiated and prosecuted by said Herbert P. Robinson and other persons for the purpose and intent of hindering, delaying and defrauding the petitioner and other creditors of the said Robinson. Respondents further aver upon information and belief that said corporation was formed for the purpose of carrying on the business of said Herbert P. Robinson and that said corporation immediately upon its formation assumed and agreed to be liable for and to pay all the indebtedness of said Herbert P. Robinson, included in which specifically by name is the indebtedness of the petitioner herein, and that the records of the proceedings of said corporation which are in the possession of your Receivers set this forth at length. Respondents further aver that all of said proceedings in the formation of the corporation and transfer of said property were completed and your Receivers were appointed and had qualified some days prior to the institution of the suit set forth in paragraph 2 of the petition.

19. Respondents are informed that if petitioner transgressed the order of your Honorable Court entered in this matter petitioner would be exposed to the risk of incurring an order in contempt. Respondents aver that the said paragraph 19 of the petition is immaterial.

20. Respondents respectfully submit to your Honorable Court that the averments of paragraph 20 of the petition are not true.

21. Respondents deny that any rights and equities in the premises will be defeated and frustrated and aver that all rights of the petitioner are as well protected as the rights of any other creditor.

[fol. 26] Respondents respectfully suggest to your Honorable Court, in addition to the foregoing answers to the petition, that the allegations in said petition contained are matters immaterial and of no relevancy; that the petition should be dismissed inasmuch as any action by way of issuance of a writ of Fieri Facias against the property in their possession as Receivers of Miller Robinson Company would tend to produce and cause serious and protracted litigation in the State Courts and would seriously interfere with and jeopardize the interests of said Receivers and of the creditors of said corporation including this petitioner and of the stockholders of said corporation.

Wherefore respondents respectfully submit themselves to the further orders of your Honorable Court.

(Sgd.) Horace B. Wilgus, Receiver.

Duly sworn to by Horace B. Wilgus. Jurat omitted in printing.

[fol. 27] In United States District Court

Order sur Petition of Bernard L. Shapiro for Leave to Issue Execution—Filed Mar. 12, 1931

The petition is denied.

By the Court:

W. H. Kirkpatrick, J.

In United States District Court

Petition for Appeal—Filed April 14, 1931

To the Honorable the Judges of said Court:

Now comes the Petitioner, Bernard L. Shapiro, and, deeming himself aggrieved by the final order of this Court, entered in the above entitled cause on the 12th day of

March, 1931, hereby prays that an appeal may be allowed from the said order to the United States Circuit Court of Appeals for the Third Circuit, and that the Clerk of the said District Court, as aforesaid, be directed to prepare and certify a transcript of the record and proceedings in said cause to the United States Circuit Court of Appeals at Philadelphia, Pennsylvania, in accordance with its Rules, in order that the errors complained of in the Assignment of Error-, herewith filed and made a part of this Petition, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

Bernard L. Shapiro, Petitioner. Jacob Weinstein, Attorney for Petitioner, 742 Real Estate Trust Building, Philadelphia, Pa.

[fol. 28] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Apr. 14, 1931

Bernard L. Shapiro, Petitioner in the above entitled cause, having prayed for an allowance of an appeal to the United States Circuit Court of Appeals for the Third Circuit from the final order, made and entered in said cause by the District Court of the United States for the Eastern District of Pennsylvania, on the 12th day of March, 1931, in said cause, and from each and every part thereof, and having presented and filed his Petition for Appeal, Assignment of Errors and prayer for reversal, pursuant to the statutes and rules of the United States Circuit Court of Appeals for the Third Circuit, in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby allowed, as prayed, to the United States Circuit Court of Appeals for the Third Circuit, from the District Court of the United States for the Eastern District of Pennsylvania in this cause, as provided by law; and

It is further ordered that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings and order, in accordance with the statutes and the rules of the said Circuit Court of Appeals, and transmit the same to the said United States Circuit Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, so that it shall

have the same in said Court within thirty days from this date.

Dated the 10th day of April, A. D. 1931.

By the Court:

W. H. Kirkpatrick, Judge.

[fol. 29] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Apr. 14, 1931

The Petitioner, Bernard L. Shapiro, assigns the following errors in the record and proceedings in this cause:

1. That the District Court of the United States for the Eastern District of Pennsylvania in this cause erred in entering the following Order, to wit:

"Sur petition of Bernard L. Shapiro for leave to issue execution.

The petition is denied.

By the Court:

W. H. Kirkpatrick, J."

2. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in refusing to grant the prayer of the Petitioner, which prayer was as follows:

"Wherefore your petitioner prays that your Honorable Court enter an order upon David Bachman and Horace B. Wilgus receivers in this cause requiring them and each of them to show cause why Bernard L. Shapiro the petitioner herein should not be permitted to issue a writ of fieri facias against the chattels and personal property in their possession as the same have heretofore been owned and possessed by Herbert P. Robinson in a cause pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, in which your petitioner is plaintiff and the said Herbert P. Robinson is defendant for the purpose of levying upon seizing and sell-

[fol. 30] ing the same so far as may be necessary to secure full satisfaction of your petitioner's judgment."

3. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in denying the prayer of the petitioner upon the petition of Bernard L. Shapiro, Petitioner.

4. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in failing by opinion, memorandum or other means to indicate upon the record of this cause, the cause of reasons for the entry of the order made herein, or for the refusal to grant the petition as prayed for.

For which errors the Petitioner prays that the said Final Order of the United States District Court for the Eastern District of Pennsylvania, entered in this cause on the 12th day of March, 1931, be reversed and the cause remanded with directions to grant the prayer of the petition, as prayed for by the Petitioner, Bernard L. Shapiro; and for such other and further relief as may be proper in the premises.

Jacob Weinstein, Attorney for Bernard L. Shapiro, Petitioner, 742 Real Estate Trust Building, Philadelphia, Pa.

[fol. 31] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Apr. 14, 1931

To the Clerk of the said District Court:

In preparing the transcript of the record in the above entitled matter, sur appeal to the United States Circuit Court of Appeals for the Third Circuit, please include therein the following documents and none other:

1. Docket Entries.
2. Bill of Complaint.
3. Answer.
4. Decree Appointing Receivers.
5. Supplementary Decree.
6. Petition of Bernard L. Shapiro.
7. Answer to said Petition, by Receivers.
8. Order of Court Sur Petition. (March 12th, 1931.)
9. Petition for Appeal.
10. Order Allowing Appeal.
11. Assignments of Error.

12. This Præcipe.
13. Clerk's Certificate.

Jacob Weinstein, Attorney for Bernard L. Shapiro, Petitioner-Appellant, 742 Real Estate Trust Building, Philadelphia, Pa.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] Minute entry of argument and submission, October 9, 1931, omitted in printing.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1931

No. 4614

BERNARD L. SHAPIRO, Appellant,

v.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of Miller Bobinson Company, Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Woolley, and Davis, Circuit Judges

OPINION—Filed December 31, 1931

BUFFINGTON, J.:

On January 12, 1931, the Court below, on the petition and bill in equity of John N. McLean, a creditor, and of Herbert P. Robinson, owner of its capital stock, both of whom are citizens of Pennsylvania, took jurisdiction and duly appointed receivers of the Miller Robinson Company, a corporate citizen of Delaware. The receivers at once qualified, took possession of all the assets and are now in possession of the same or their liquidated proceeds.

[fol. 35] Herbert P. Robinson, above named, was the owner of a lumber yard and business in Philadelphia. He had very considerable property and had incurred substantial indebtedness. He was solvent to the extent of a hundred thousand dollars, but creditors threatened suits and the con-

sequent destruction of his business and sacrifice of his assets. To meet this situation, to prevent the sacrifice of his business, to prevent the preference of the threatening creditors, and to conserve the large equity of his creditors and himself in his property, Robinson took the course of an honest man, namely, placing his assets in the hands of a court empowered to thwart preference to one creditor and ensure equality to all through a liquidation of his assets gradually. Had he chosen to do so, he could, under the Pennsylvania practice, have made an assignment of all his assets, but it is clear that this would have laid the grounds for, and practically brought on, a petition in bankruptcy. Under the State law, a receiver cannot be appointed for an individual: 258 Pa. St. 85. So, under the advice of honest and able counsel, he followed the only course open to him to effect his honest purpose of preventing a sacrifice of his property, thwarting all efforts of creditors to get preferences, and ensuring the continuance and gradual liquidation of his business and an equal distribution among all his creditors. With that in view, he procured the incorporation of the Delaware company, and in consideration of the issue to him of all its capital stock transferred to it all his property, but subject to his debts and on its written agreement to pay all of said debts which, including the debt of the appellant, were specified. With the exception of the two creditors who sought preferences, practically all the creditors were satisfied with the course Robinson took. But two of his creditors, one of whom is the appellant, although their debts were specified and assumed by the corporation, were [fols. 36 & 37] not content with this equality of creditors, but sought to obtain a preference over their fellows. To this effort the Court below refused to become a party and from a decree which ensured the equality of all the creditors and the non-preference of this appellant this appeal was taken.

Passing the motion to quash on the ground the appeal was not taken in due time, we dispose of the case on the merits.

After the Court below had jurisdiction and had taken possession of all the property as above stated, the appellant brought suit against Robinson in a state court, recovered a judgment, and then issued an execution. Thereafter he presented a petition to the Court below in which he

alleged the chartering of the company, the transfer of Robinson's property to it, the filing of the bill, and the appointment of receivers were a fraud—assertions which were denied by answer—and of which unwarranted statements no proof whatever was made. He prayed leave of the Court below to allow him to levy, by his execution, on the property in possession of the Court. On hearing, the Court rightly dismissed his petition. The statement of the facts is a justification of the Court's action and its order is affirmed. As the action of the Court below was embodied in the four word order "The petition is denied", we refer to the opinion of the painstaking Judge who in a similar unwarranted application of another creditor set forth the reasons why such a course would not be sanctioned.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 38] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1931

No. 4614 (List No. 20)

Bernard L. Shapiro, Appellant,

vs.

H. B. Wilgus et al., Rcvrs. Miller Robinson Co., Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Judgment—Filed Dec. 31, 1931

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of the said District Court of March 12, 1931, denying the petition of Bernard L. Shapiro in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, December 31, 1931.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

[fols. 39-48] Petition for rehearing, covering nine pages, omitted from this print. It was denied and nothing more by order of January 28, 1932.

[fol. 49] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Order Denying Rehearing—Filed Jan. 28, 1932

And now, to wit, January 28, 1932, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— —, ——.

Per Curiam:

—— ——, Circuit Judge.

[File endorsement omitted.]

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] Supreme Court of the United States

Order Allowing Certiorari—Filed May 16, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,695. U. S. Circuit Court of Appeals, Third Circuit. Term No. 40. Bernard L. Shapiro, petitioner, vs. Horace B. Wilgus and David Bachman, receivers of Miller Robinson Company. Petition for a writ of certiorari and exhibit thereto. Filed April 18, 1932. File No. 36,695.

FILE COPY

APR 18 19

No. [redacted] 40 October Term, 1931

IN THE

Supreme Court of the United States

BERNARD L. SHAPIRO, PETITIONER,

vs.

HORACE B. WILGUS AND DAVID BACHMAN, RECEIVERS OF MILLER ROBINSON COMPANY, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JACOB WEINSTEIN,
742 Real Estate Trust Bldg.,
Philadelphia, Pa.

FRANCIS BIDDLE,
1601 Morris Bldg.,
Philadelphia, Pa.,
Attorneys for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
FRANK T. GORMLEY, PHILADELPHIA REPRESENTATIVE.

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IN THE

Supreme Court of the United States

No..... OCTOBER TERM, 1931.

BERNARD L. SHAPIRO, Petitioner,

vs.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of MILLER ROBINSON COMPANY, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Bernard L. Shapiro, in support of the petition for a writ of certiorari, to be directed to the United States Circuit Court of Appeals for the Third Circuit, to review a judgment rendered on the 31st day of December, 1931, which affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania, entered on March 12th, 1931, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. That Bernard L. Shapiro, the petitioner, held a note of Herbert P. Robinson for $1,000, which matured on December 19, 1930. On January 9, 1931, Robinson organ-

ized Miller Robinson Company under the laws of the State of Delaware; and on the same day conveyed all his assets to the new corporation, which assumed his debts. On January 12, 1931, Robinson applied for an equitable receivership in the United States District Court for the Eastern District of Pennsylvania, against the Delaware corporation, and the Court appointed two receivers on the same day; and the next day discharged one of the receivers and appointed another in his place. The receivers are the respondents in this petition.

2. On January 16, 1931, Shapiro, the petitioner, brought suit against Robinson on his note in the Court of Common Pleas No. 4, of Philadelphia County, and obtained judgment on the note by default on February 4, 1931.

3. On February 26, 1931, Shapiro filed his petition in the United States District Court for leave to issue execution against property in the possession of the receivers, on his judgment obtained in the State Court. This petition stated these facts, and alleged that they constituted fraud on the petitioner as one of Robinson's creditors. Upon this a rule to show cause was granted. The receivers, in their answer, filed at Bar upon the return day of the rule (March 4, 1931) admitted the facts set forth in the petition, denying only the fraudulent intent.

4. The United States District Court, on March 12, 1931, after argument upon petition and answer, denied the petition without filing an opinion. An appeal was taken to the United States Circuit Court of Appeals for the Third Circuit, and the order denying the petition was affirmed by that Court on December 31st, 1931, and a petition for rehearing denied on January 28, 1932.

5. From the schedule of assets and liabilities attached as Exhibit "A" to the Bill of Complaint, praying for the

appointment of receivers, filed by Robinson and a creditor as co-plaintiff, it appears that the assets of this corporation exceeded the liabilities by about $100,000 (Record p. 8); and the Circuit Court of Appeals stated in its opinion that Robinson was solvent at the time of the conveyance and the application for the receivership.

6. The grounds of the opinion of the Circuit Court of Appeals were that Robinson, in order to prevent suits against him and the consequent destruction of his business, had procured the incorporation of a Delaware corporation for the purpose of obtaining a receiver, since, under the law of the State of Pennsylvania, no receiver can be appointed for an individual; and then had transferred all his property to the corporation; the Court believing that he had "thus acted like an honest man in preventing preferences".

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The basis of the petitioner's complaint is fraudulent conveyance predicated on the facts aforesaid. Under the State practice the petitioner had the right to levy on goods held by the corporation as Robinson's assignee, and thus raise the question of fraud, should the corporation claim title to the goods, the question of fraud being then properly determined by a jury under the State practice.

2. The petitioner, therefore, says that by the decree of the District Court refusing permission to execute upon the assets on which levy could be made, he is deprived of his right to have the question of fraud determined by a jury.

3. The petitioner says that the creation of the corporation in Delaware by Robinson, and his application for a receivership for it in the United States District Court, conferred colorable jurisdiction on that Court by reason of

diversity of citizenship, and was, therefore, in violation of Section 37 of the Judicial Code, providing for the dismissal of suits where the parties have been improperly or collusively joined.

4. The petitioner says that the conveyance to the corporation by Robinson of all his assets rendered him insolvent, and was fraudulent at common law in Pennsylvania, and under the Pennsylvania Fraudulent Conveyance Act, which provides that a conveyance made by a person who will thereby render himself insolvent is fraudulent "*without regard to his actual intent*", if made without consideration.

5. The petitioner says that he could have levied against the corporation's assets, thus raising the question of fraud; and that he should be permitted the same action against the receivers' assets, since their title is no higher or better than the title of the corporation.

6. The petitioner says that the practical result of this decision is to permit a solvent individual citizen of Pennsylvania to incorporate in Delaware in order to create diversity of citizenship, and, thereby, colorably confer jurisdiction on a United States Court, and to transfer his assets to the corporation with the conceded intent of getting them out of the reach of his creditors.

7. The petitioner says that in its opinion the Circuit Court of Appeals said that your petitioner "sought to obtain a preference"; whereas a preference, as defined by the Bankruptcy Act, is where the person giving the preference is insolvent, and the preference is given within four months of bankruptcy, both conditions found non-existent by that Court.

8. The petitioner says that this decision of the Circuit Court of Appeals is in conflict with the decisions of the United States Supreme Court, is in conflict with the applicable local decisions of the Pennsylvania law, is untenable and in conflict with the weight of authority, State and Federal and is such a departure from the accepted and usual course of judicial proceeding as to call for the exercise of the power of supervision of the Supreme Court of the United States.

9. The petitioner further says that the decision violates the petitioner's constitutional right to a trial by jury, under the Seventh Amendment to the United States Constitution.

WHEREFORE, Your petitioner respectfully prays:

THAT a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all of the proceedings in the cause, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief as to this Court may seem proper and be in conformity with the law.

And your petitioner will ever pray.

BERNARD L. SHAPIRO,
By: JACOB WEINSTEIN,
FRANCIS BIDDLE,
Attorneys for Petitioner.

State of Pennsylvania,
County of Philadelphia. } ss.:

FRANCIS BIDDLE, being duly sworn according to law, deposes and says that he is of counsel for the above named Petitioner, that he prepared the foregoing Petition, and that the allegations contained therein are true to the best of his knowledge, information and belief.

(Signed) Francis Biddle

Sworn to and subscribed before me this 12th day of April, 1932.

Helen G. Gehl
Notary Public
My Commission Expires Jan 6, 1935

BRIEF IN SUPPORT OF THE PETITION.

I.

THE OPINIONS OF THE COURTS BELOW.

a. The District Court of the United States for the Eastern District of Pennsylvania, in which this cause originated filed no opinion.

b. The Circuit Court of Appeals for the Third Circuit filed an opinion on December 31, 1931. As this brief goes to press it is still unreported.

It is printed in the record at p. 33.

II.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to Sec. 240 of the Judicial Code as amended by 43 Stat. at Large, 938 Sec. 1 (February 13, 1925).

28 U. S. C. A., Sec. 347

and

30 Stat. at Large, 553 C. 541, Sec. 25 (July 1, 1898) and 43 Stat. at Large, 936, 941, C. 229, Sec. 1, Sec. 13, clause (C).

11 U. S. C. A., Sec. 48.

(By reason of the holding of the Circuit Court of Appeals touching the matter of illegal preference, first introduced by that Court.)

III.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Third Circuit erred in affirming the order of the United States District Court for the Eastern District of Pennsylvania denying the petitioner's prayer for leave to issue execution.

IV.

STATEMENT OF THE CASE.

Bernard L. Shapiro, the petitioner, held a note of Herbert P. Robinson for $1,000, which matured on December 19, 1930. On January 9, 1931, Robinson organized Miller Robinson Company in Delaware; on the same day conveyed all his assets to it, the corporation assuming his debts; and three days later, as holder of 99% of its stock, applied, with a creditor, for an equitable receivership, the corporation, in its answer, joining in the prayer of the bill. The same day the United States District Court appointed Coulbourn and Bachman receivers; and on the next day Coulbourn was discharged and Wilgus appointed in his place. On January 16, 1931, the petitioner brought suit on his note in a State Court, obtained judgment by default against Robinson on February 4, 1931; and thereupon filed his petition against the receivers as respondents, in the

District Court, for leave to issue execution on the judgment obtained in the State Court, against property held by the receivers. The District Court denied the petition, without filing an opinion; and on appeal, the Circuit Court of Appeals affirmed this order. Robinson, the Court said, though solvent, in order to prevent "threatened suits and the consequent destruction of his business", since "under the State law, a receiver cannot be appointed for an individual," had "procured the incorporation of the Delaware company, and in consideration of the issue to him of all its capital stock transferred to it all his property," the company assuming his debts; and had thus acted like an honest man in preventing preferences.

V.

ARGUMENT.

(1.) THE PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO A JURY TRIAL IN THE STATE COURT.

There are no facts in controversy, except that the petitioner says that the whole transaction is a fraud on creditors and the receivers deny fraud. Since the District Court filed no opinion, it is impossible to know the basis of its decision (1). But the Circuit Court of Appeals missed the substance of the error. Shapiro was not asking the Court to find fraud, but to permit him to have that question tested by a jury, a right to which he was entitled under State practice and in the State Court. Unhampered by the receivership he would have issued his writ of *fieri facias*, against the personal property; the corporation would have made a property claim; and the question of fraud (not of

(1) This is a real hardship on petitioner, especially in equity, where matters of fact are found: Virginian Railway Company vs. U. S., 272 U. S. 675 (1926); and constitutes error; Railroad Commission vs. Maxcy, 281 U. S. 82 (1930).

honorable motive, but of *legal fraud* on creditors) would have been submitted to a jury. *Handel, etc., Building and Loan Association vs. Elleford,* 258 Pa. 143 (1917); and *American Trust Co. vs. Kaufman,* 276 Pa. 35 (1923).

In the latter case the Court said (p. 39):

> "A conveyance of property made by a debtor to defraud creditors is void as to them * * * and the title for the purpose of enabling creditors to enforce their debts remains in the grantor * * * A judgment creditor is allowed to levy upon and sell any title * * * alleged to be in the grantor * * *"

And the United States Supreme Court has held that where the issue is fraudulent conveyance, the litigant has a constitutional right to a jury trial and cannot be deprived of that right in a Federal Court under the seventh amendment of the Federal Constitution, under a State statute, by the use of a bill in equity, seeking to set aside the conveyance, and to subject the property to the payment of debts. *Scott vs. Neely,* 140 U. S. 106 (1890) (1)

(2.) COLLUSIVE JURISDICTION.

As the Circuit Court of Appeals pointed out, Robinson could not have obtained a receiver for himself in any State Court (1), and in that status the District Court had no jurisdiction in the matter. He, therefore, caused the creation

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(1) And, more recently, in Ex parte Skinner & Eddy Corporation, 235 U. S. 96 (1923).

To say that concurrent jurisdiction, where conferred by State practice, exists in equity, does not mean that petitioner must submit himself to equity. The choice is his. Twist vs. Prairie Oil Co., 274 U. S. 684, 689 (1927). And if his right is to a jury trial, in a suit at common law, how can this right be impaired, by this device of his debtor, under the provisions of the Seventh Amendment?

(1) Hogsett vs. Thompson, 258 Pa. 85 (1917).

of a corporation to escape the consequence of the local law; and its organization to confer jurisdiction, on the ground of diversity of citizenship, in a Federal Court. This is a violation of Section 37 of the Judicial Code, (2) which provides for the dismissal of a case where "*the parties * * * have been improperly or collusively made or joined* * * for the purpose of creating a case cognizable * * * under this chapter * * *.*"

In *Miller & Lux v. East Side Canal Co.*, 211 U. S. 293 (1908), a California corporation instituted a bill in equity in a Court of that state against another California corporation, and thereafter caused the organization of a Nevada corporation, taking all of its stock, and conveying all its property to the new corporation. The suit in the State Court was discontinued, and a bill filed by the Nevada corporation in the United States Court, jurisdiction being obtained by the diversity of citizenship thus created. The Supreme Court held that the action was collusive, under the Statute, to "invoke the jurisdiction of the Federal Court and avoid the determination of the rights of the parties in the Courts of the State (p. 304);" and affirmed a decree dismissing the bill.

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(2) Judicial Code, Section 37 (28 USCA, Sec. 80):

"If in any suit commenced in a District Court, or removed from a State Court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed as justice may require, and shall make such order as to costs as shall be just."

(3.) THE CONVEYANCE WAS FRAUDULENT UNDER THE UNIFORM FRAUDULENT CONVEYANCE ACT OF PENNSYLVANIA AND UNDER 13 ELIZABETH IN FORCE IN THAT STATE.

The Uniform Fraudulent Conveyance Act provides (1):

> "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors, *without regard to his actual intent*, if the conveyance is made or the obligation is incurred without a fair consideration."

Robinson conveyed all his assets to the corporation, thereby rendering himself insolvent, though he was amply solvent before, for nothing except the technical consideration of the corporation's stock. The stock was not a "fair consideration". His assets were $274,315.82, his liabilities only $175,746.59 (Record, pp. 8, 9); so that, as the Circuit Court of Appeals pointed out, "he was solvent to the extent of a hundred thousand dollars" (Record, p. 34). But after the conveyance he had nothing.

And whatever his motive was, his intent, even if, in view of this act, such intent were in any way relevant, was to withdraw all he had from the reach of his creditors. Therefore that the Court considered his action not only honest but praiseworthy, is perhaps interesting, but hardly relevant. Whether for their best interests or not Robinson defrauded his creditors; doubtless from the most scrupulous of motives, but hardly under the sanction of law; and the denial of fraud is, after all, "equivalent to nothing more than a denial of a conclusion of law (1)." For fraud here

(1) Act of May 21, 1921, P. L. 1045, Sec. 4, Purdon's Penna. Stat. Ann., Title 39, Section 354, P. 257).

(1) Lathrop vs. Drake, 91 U. S. 516, 520 (1875).

is a conclusion of law made inevitably applicable by the admitted facts.

Under 13 Eliz. part of the common law of Pennsylvania, *an intent to delay creditors is fraud.* The Supreme Court of Pennsylvania has said: "The consideration of a sale may amount to the value of the land sold, and yet the sale be fraudulent as against creditors, because such sale may delay, hinder, and obstruct them in the collection of their debts. Such a sale for value may not only delay and hinder them but may also be made for that very purpose and intent * * * It is the intent that gives character to the transaction; and when the act corresponds with the intent, and both concur in delaying and hindering creditors, the deed is void (2).

And again: "The Statute of 13 Eliz. being directed against conveyances that *hinder and delay* (the italics are the court's) creditors, * * * bargains which * * * tie up property out of reach of creditors, preventing the collection of their debts in the ordinary course of law, are held to be against the Statute, and fraudulent in law (1)". An illustration of this is a judgment confessed for an honest debt, but given to force other creditors to compromise, which is fraud on them (2).

That fraud exists under these circumstances has been squarely decided by the Circuit Court of Appeals for the Second Circuit, on facts almost identical with ours. *In re: American Candy Mfg. Co.* (3) a corporation conveyed all its assets to another corporation, the latter assuming its debts, the former thus becoming insolvent. Bankruptcy of the second corporation followed; and a creditor, who had

(2) Zerbe v. Miller, 16 Pa. 488, 497 (1851).
(1) Hennen v. McClane, 88 Pa. 219 (1878).
(2) Bunn, Raiguel & Co. v. Ahl, 29 Pa. 387 (1857).
(3) 256 F. 87 (1919).

obtained his judgment after the conveyance, petitioned to set aside sufficient of the bankrupt's property to pay his debt. All the other creditors had filed claims against the bankrupt, and had not joined in the petition. Judge Hough held the conveyance fraudulent, and granted the relief prayed for, pointing out that the petitioner might have levied an attachment on the property fraudulently conveyed. And Judge Hand, in a similar case (4), pointed out that an intent to delay will defeat such a conveyance as effectively as an intent to defraud; and that no consideration will support a fraudulent conveyance. The cases are under a New York Statute, but express the universal common law principle.

And upon like facts the Law of Pennsylvania is the same (1).

(4.) THAT THE RECEIVER NOW HAS THE PROPERTY SHOULD NOT PREVENT THE COURT FROM PERMITTING A LEVY ON IT, IN THE USUAL WAY, TO DETERMINE THE FRAUD.

The Receiver's title, of course, adds nothing to the corporation's title (2). We attack not the receivers' appointment, but their title to the property. If execution could have issued against the property, while held by the corporation, before the receivership, and the question of fraud tested by a property claim, under both State and Federal practice in this District, how can the Court prevent the petitioner's testing *the question of fraud*, against the receivers,

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(4) **Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.**, 20 F. (2d) 295 (1927).

(1) **Montgomery Web Co. v. Dieselt.** 133 Pa. 585 (1890). **Atlas Portland Cement Co. v. Brick Co.**, 280 Pa. 449 (1924).

(2) **Fosdick v. Schall**, 99 U. S. 251 (1878): "The possession taken by the receiver * * * adds nothing to the previously existing title * * *." **In re American Candy Mfg. Co.**, cited **supra**, p. 89: "The trustee in bankruptcy stands in the shoes of the (bankrupt which) * * * took nothing by the conveyance, except what remained after accounting to non-consenting creditors."

in the same way? If there is fraud the receivers cannot hold the property; and that they now hold them as officers of the Court cannot cure such a defect in their title. The District Court has denied the right of the petitioner to have a jury trial to test the question of fraud; his right to a court's judgment on this issue; and his resultant right to satisfy his judgment out of the property now held by the receivers, to the extent necessary to liquidate his judgment, without hardship to other creditors, since the Circuit Court of Appeals has found that *the debtor was solvent.* For "a fraudulent conveyance passes no title to the grantee (and hence to the receiver) as against the creditor offended (1)".

The Circuit Court of Appeals defends Robinson's actions on the ground that they were taken "to prevent the sacrifice of his business, to prevent the *preference* of the threatening creditors, and to conserve the large equity of his creditors an himself in his property"; and speaks again of Robinson's thwarting a *preference;* and that only two creditors (one of them the petitioner) *"sought preferences"* (italics ours). But the use of the word is as invidious as it is inexact. The only preference in a legal sense is one obtained *during insolvency* and prior to bankruptcy. The Bankruptcy Act provides that a "person shall be deemed to have given a preference, if, *being insolvent,* he has, within four months before the filing of the petition, procured or suffered a judgment to be entered against himself in favor of any person (2)." Robinson was neither insolvent nor bankrupt. The petitioner therefore has a right to protect his own claim by suit, and if he gains an advantage, no one can object.

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(1) **Chandler v. Van Reeder, 24 How. 227 (1860).**

(2) **July 1, 1898, C. 541, Sec. 60, as amended 11 U. S. C. A. Sec 96, May 27, 1926, C. 406, Sec. 1. See also Sec. 3, 30 Stat. 546 of the Act July 1, 1898, as amended 11 U. S. C. A. Sec. 21.**

The Supreme Court of the United States has said:

> "It is not to be disputed that, except as forbidden by bankrupt law, a debtor has the right to prefer one creditor over another, and that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests (3)."

VI.

CONCLUSION.

The extraordinary principles, established by this case, are:

(1) A solvent individual citizen of Pennsylvania may incorporate himself in Delaware in order to create diversity of citizenship in a United States District Court for the purpose of giving collusive jurisdiction to that Court to appoint a receiver, which result he could not have obtained in the State Court.

(2) A solvent individual may transfer all his goods to a corporation with the avowed intent of getting them out of reach of his creditors; and yet this is not fraud, nor evidence of fraud sufficient to be submitted to a jury.

This judgment is in conflict with the decisions of the Supreme Court of Pennsylvania and the decisions of the Supreme Court of the United States; and in conflict with the general weight of authority as hereinbefore indicated.

Respectfully submitted,

JACOB WEINSTEIN,
FRANCIS BIDDLE,
Attorneys for Petitioner.

April 12, 1932.

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(3) Blennerhassett v. Sherman, 105 U. S. 100, 117 (1881).

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IN THE

Supreme Court of the United States

No. 40 **October Term, 1932**

BERNARD L. SHAPIRO, PETITIONER,

vs.

HORACE B. WILGUS AND DAVID BACHMAN, RECEIVERS OF MILLER ROBINSON COMPANY, RESPONDENTS.

PETITIONER'S BRIEF.

I.

THE OPINIONS OF THE COURTS BELOW.

a. The District Court of the United States for the Eastern District of Pennsylvania, in which this cause originated filed no opinion.

b. The Circuit Court of Appeals for the Third Circuit filed an opinion on December 31, 1931. Reported in 55 Fed. 2nd 234 (See post p. 46).

It is printed in the record at p. 23.

II.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to Sec. 240 of the Judicial Code as amended by 43 Stat. at Large, 938 Sec. 1 (February 13, 1925).

28 U. S. C. A., Sec. 347

and

30 Stat. at Large, 553 C. 541, Sec. 25 (July 1, 1898) and 43 Stat. at Large, 936, 941, C. 229, Sec. 1, Sec. 13, clause (C).

11 U. S. C. A., Sec. 48.

(By reason of the holding of the Circuit Court of Appeals touching the matter of illegal preference, first introduced by that Court.)

III.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in affirming the order of the United States District Court for the Eastern District of Pennsylvania denying the petitioner's prayer for leave to issue execution.

2. That the District Court of the United States for the Eastern District of Pennsylvania in this cause erred in entering the following Order, to-wit:

> "Sur petition of Bernard L. Shapiro for leave to issue execution.
>
> The petition is denied.
>
> BY THE COURT,
> W. H. KIRKPATRICK,
> *J.*"

3. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in refusing to grant the prayer of the petitioner, which prayer was as follows:

> "Wherefore your petitioner prays that your Honorable Court enter an order upon David Bachman and Horace B. Wilgus receivers in this cause requiring them and each of them to show cause why Bernard L. Shapiro the petitioner herein should not be permitted to issue a writ of *fieri facias* against the chattels and personal property in their possession as the same have heretofore been owned and possessed by Herbert P. Robinson in a cause pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, in which your petitioner

is plaintiff and the said Herbert P. Robinson is defendant for the purpose of levying upon, seizing and selling the same so far as may be necessary to secure full satisfaction of your petitioner's judgment."

4. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in denying the prayer of the petition upon the petition of Bernard L. Shapiro, petitioner.

5. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in failing, by opinion, memorandum or other means to indicate upon the record of this cause, the cause of reasons for the entry of the order made herein, or for the refusal to grant the petition as prayed for.

[Specification of Errors 2-3-4-5 (Record p. 21) are those assigned in the appeal from the District Court to the Circuit Court of Appeals and the matter being here by the granting of the Writ of Certiorari these, in addition to specification 1 assigned in the Petition therefor, are all properly here for examination. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 567 (1931); U. S. v. Rogers, 255 U. S. 168 (1920).]

IV.

STATEMENT OF THE CASE.

Bernard L. Shapiro, a citizen of Pennsylvania, the petitioner, held a promissory note of Herbert P. Robinson, a citizen of Pennsylvania, for $1,000, which matured on December 19, 1930. On January 9, 1931, Robinson organized Miller Robinson Company in Delaware; on the same day conveyed all his assets to it, the corporation assuming his debts; and three days later, as holder of 99% of its stock, applied, with a simple contract creditor, for an equitable receivership, the corporation, in its answer, joining in the

prayer of the bill. The same day the United States District Court for the Eastern District of Pennsylvania appointed Coulbourn and Bachman receivers in the Equity proceedings; and on the next day Coulbourn was discharged and Wilgus appointed in his place. On January 16, 1931, the petitioner brought suit on his note in the State Court in Philadelphia County, Pennsylvania, obtained judgment by default against Robinson on February 4, 1931; and thereupon filed his petition against the receivers as respondents, in the District Court, for leave to issue execution on the judgment obtained in the State Court, against tangible personal property held by the receivers upon the theory that Robinson's acts were fraudulent as against creditors. The District Court denied the petition, without filing an opinion; and on appeal, the Circuit Court of Appeals affirmed this order. Robinson, the Court of Appeals said, though solvent, in order to prevent "threatened suits and the consequent destruction of his business", since "under the State law, a receiver cannot be appointed for an individual," had "procured the incorporation of the Delaware company, and in consideration of the issue to him of all its capital stock transferred to it all his property," the company assuming his debts; and had thus acted like an honest man in preventing preferences.

In the due course of procedure a petition for rehearing was filed in the Circuit Court of Appeals, which by its order without opinion filed, on January 28, 1932 denied the petition.

Thereupon the petitioner, Bernard L. Shapiro, on April 18, 1932, filed in this Court his petition for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit in consequence of which this Court by order filed May 16, 1932 granted the Petition for the Writ of Certiorari without condition or limitation.

V.

ARGUMENT.

Since as before noted the Writ of Certiorari herein was granted by this Court without condition or limitation by force of

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 567 (1931)

all questions raised by petitioner arising and apparent upon the records of both Courts below whether decided or noticed by such Courts are open for review. We believe, however, that fairness to this Court requires a distinction and division in argument falling into two categories, first, points specifically made the basis of the Petition for Certiorari here, and secondly those present in the records of the Courts below not employed for such purpose and so we shall divide and isolate it.

A.

POINTS RAISED BY THE PETITION FOR THE WRIT OF CERTIORARI:

1. **The Petitioner was unconstitutionally deprived of his right to a jury trial in the State Court.**
2. **That the proceedings in the District Court giving rise to the controversy were illegally collusive.**
3. **That the conveyance assailed in the controversy was fraudulent under the Uniform Fraudulent Conveyance Act of Pennsylvania and under 13 Elizabeth in force in that State.**
4. **That the Receivers' possession is not a legal obstacle to prevent attack upon the alleged fraudulent character of the transaction by customary procedural instruments employed in practice in the State where the transaction is assailed.**
5. **That a solvent debtor as to any of his creditors cannot create an illegal preference.**

B.

POINTS APPARENT ON THE FACE OF THE RECORD NOT PRESSED BY THE PETITION FOR CERTIORARI:

1. **Is it the duty of a judge in a Federal Court of the first instance in determining a matter falling within his jurisdiction to place upon the record by some method the reasons for his action?**
2. **By what methods of procedure are issues of fact in the Eastern District of Pennsylvania arising upon motions in equity proceedings to be determined?**
3. **Can the personal attributes of counsel promoting a given legal situation in any manner effect the legality thereof?**
4. **Does the present record disclose the action of counsel involved to be either able or honest as tested by acceptable standards?**
5. **Can posterior judicial action between strangers involving one of several legal issues be judicial justification for anterior judicial action between different parties based upon the other legal issues?**
6. **Does the transaction disclosed upon the Record violate the Pennsylvania Sales in Bulk Law?**

Out of an abundance of caution and not because it appears in any manner to be assailed, it seems wise by way of prelude to justify the procedural device employed by the petitioner upon the present record, which begets the contest, before approaching substantive matters. The record makes it plain (R. 11-15-16) that what the petitioner sought from the District Court was leave to issue execution against personal property in the hands of its Receivers. Is such procedure warranted by equity practice? This Court in

Wiswall v. Sampson, 14 How. 52 (1852)

gives the answer. Mr. Justice Nelson there writing declares p. 68: "It is competent and might in some cases be fit and proper *for the Court, where the property in dispute is ample and the litigation protracted to permit the execution to issue* and compel the prosecuting creditor to pay off the judgment."

Thus arises the primary inquiry was the property ample? Abundantly so, *by one hundred thousand dollars!* So found by the Circuit Court of Appeals (R. 23-24) and plainly admitted by respondents and the chief plotter swears to it (R. 13-17-6-7). Then would the litigation be protracted? This Court in the breadth of its judicial experience can best supply the answer and therefore judicially know whether the administration of Federal receiverships in equity are long or short, or how long or how short? No one suggests, nor does the record, that when this case came into this Court on April, 1932, the receivership had terminated, though it began January 12, 1931, hence we hope to be forgiven if we tenaciously hold to the notion that this falls in with the idea of Mr. Justice Nelson that this litigation even then was "protracted," leaving the future to care for itself. In that light we feel that the case made by the petitioner in the procedural zone meets all the conditions laid down by Wiswall v. Sampson, *supra*, even if it could entirely be kept out of mind, which it cannot, that *petitioner's assault is grounded on fraud.* Surely this element cannot be deemed as an undermining influence to the petitioner, for we know that when the element of fraud is present, the instrument of procedure adopted by the petitioner has always found approval in equity practice.

Russell v. East Anglian Rwy. Co., 3 MacN. & G. 125, 42 Eng. Reprint 208 (1850).

Gooch v. Haworth, 3 Beav. 428, 49 Eng. Reprint 168 (1841).

which latter is cited and followed by this Court in Wiswall v. Sampson, *supra*, p. 68.

It seems to follow therefore that upon the propriety of the procedure adopted by the petitioner in the District Court he cannot be dislodged.

Thus we come to points of substantive law as involved in this record and consider

A.

1. The petitioner was unconstitutionally deprived of his right to a jury trial in the State Court.

(Specification of Errors 1-2-3-4.)

A simple reading of the petition of the appellant, filed in the District Court (Record p. 11, *et seq.)* will definitely establish that the contention of the petitioner as embodied in that petition, was to vindicate his contention that Herbert P. Robinson and his co-conspirators, through the device of the Delaware Corporation to take and receive his assets and the receivership initiated by him with success three days thereafter, was a device to hinder, delay and defraud the petitioner in and about the collection of the petitioner's debt; or to put it in another way, declaring the transaction a fraudulent conveyance, which he sought to challenge by the instrument before and hereafter to be shown entirely appropriate for the purpose. This, of necessity, drew forth the answer of the respondents found in the record (R. 16 *et seq.)*, which in no manner attempts to traverse the facts which the petitioner pleaded in the petition, and filed at the bar of the District Court on the return day of the order to show cause. These pleadings then, which were all that was before the District Court on the return day of the order on March 4th, 1931, clearly, definitely and unmistakably manifested the fact that the petitioner was endeavoring to abrogate and nullify a fraudulent conveyance of personal property. That being his certain purpose, the petitioner contends now, as he contended in both Courts below uncompromisingly, that the only proper forum by which this might be done in the Federal Courts was by a trial by jury. The order appealed from must be

construed as a rejection of this contention, for we will not believe that the Courts below ever intended to hold that the petitioner was without other remedy, although any sort of implication may arise when the Court elects to keep silent upon this all important subject. Guessing as we must, we assume that the Courts below entertained the idea that Shapiro might press his contention before an auditor or master if and when the receivers should account, and certainly this is the best construction which can be placed upon the action of the Courts below in this phase of the matter. If that assumption be well founded, we deny here, that the petitioner, claiming to be defrauded by the fraudulent conveyance, can in the Federal Court, be compelled to test the issue before an auditor or master passing upon the receivers' accounts, and, so far as we now see it, the action of the Courts below offers the suggestion of nothing else.

In this regard, our clear and emphatic position is that the issue, made by the petition and answer alone can constitutionally be tried before a jury upon the petitioner's selection of that forum, and, as to a suitor claiming the right to a jury trial, the issue of a fraudulent conveyance cannot be tried before an auditor or master in an equity case against the creditor's objection. The basis of this contention is found in the Seventh Amendment of the Federal Constitution, reading as it does:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This amendment, as bearing upon the question made by this record, came squarely before the Supreme Court of the United States in the leading case of

Scott v. Neely, 140 U. S. 106 (1890)

which unmistakably holds that so far as the *Federal Courts are concerned when the issue is fraudulent conveyance, the litigant has a constitutional right to a jury trial.*

This principle remains unimpaired in more recent times, for again it is held that in Federal Courts the *issue of fraudulent conveyance is to be determined by a jury and not otherwise.*

Adams v. Jones, 11 Fed. 2nd 759 (1926),

and this appears to be true in every issue arising in a common law action upon the ground of fraud, it being erroneous to transfer an action at law upon such ground to the equity side of the Court.

Issenhuth v. Kirkpatrick, 258 Fed. 293 (1919),

following in principle this Court in

Ex Parte Simons, 247 U. S. 231 (1918),

as amplified more recently by the same Court in the case of

Ex Parte Skinner & Eddy Corp., 265 U. S. 96 (1923)

holding, in effect, *that where a right to a jury trial in a State Court exists, no order may be made by a Federal Court, denying such right.*

All this is re-enforced when the petitioner's real objective comes to light, for all that he seeks is the payment of his debt in money and so, where the object of the action is the recovery of a mere money judgment, and, of course, this includes satisfaction, the Seventh Amendment insures to the suitor a jury trial.

Whitehead v. Shattuck, 138 U. S. 151 (1890).

This makes necessary to determine whether, by the law of Pennsylvania, where the transaction under present examination was consummated, would entitle the petitioner to a jury trial. There we see that the remedy of the creditor, claiming to be defrauded by a conveyance of personal property, is to initiate his remedy by a Writ of *Fieri Facias*, levying upon the subject of the conveyance (as was sought by the present pettion), has uniformly been regarded as a proper one for that purpose, as demonstrated by the Pennsylvania cases of:

Building & Loan Assn. v. Elleford, 258 Pa. 144 (1917).

American Trust Co. v. Kaufman, 276 Pa. 41-42 (1923).

Irwin v. Hess, 12 Pa. Sup. Ct. 163 (1893).

First National Bank v. Parks, 94 Pa. Supr. Ct. 570 (1928).

Montgomery Web Co. v. Dienelt, 133 Pa. 585 (1890).

Atlas Portland Cement Co. v. American Brick Co., 280 Pa. 449 (1924).

Delphia Mills Co. v. Richards, 62 Pa. Sup. Ct. 9 (1915),

and, of course, the Pennsylvania law is determinative in this connection, both as to matter of substance upon the issue of fraudulent conveyance,

Anderson v. Gray, 284 Fed. 773 (1922),

In Re Locust Building Co., 299 Fed. 764 (1924),

Lloyd v. Fulton, 91 U. S. 485 (1875),

Olcott v. Bynum, 17 Wallace 44 (1872),

and upon the procedural aspect by force of the Conformity Act, which is not strictly involved, the case arising in the Court of Common Pleas of Philadelphia County.

Now, the petitioner freely concedes that upon the issue of fraud, concurrent jurisdiction may also exist in equity, but the concession helps the respondents' situation not at all, for here the petitioner insists, as he has always insisted, that the validity of the transaction be determined by a jury, and, having taken that unwavering position, he cannot in the Federal Courts be deprived of the jury trial, first, because such deprivation can only be effected by an express waiver thereof in writing in the Federal jurisdiction.

Baylis v. Travellers Insurance Co., 113 U. S. 321 (1885),

and this record presents the very antithesis of any such writing.

And for a secondary reason, that though there may be such concurrent jurisdiction, the choice rests with the petitioner and not with the respondents, or any other person or authority, for where concurrent remedies for a cause of action subsist in different forums, the choice of the forum rests with the plaintiff,

Twist v. Prairie Oil Co., 274 U. S. 689 (1926),
"The Atlas", 93 U. S. 316 (1876),
Norton v. Switzer, 93 U. S. 356 (1876),
U. S. vs. Whited & Wheless, 246 U. S. 552 (1918).
Wallis v. Shelley, 30 Fed. 747 (1887),

and in recent times this principle is still unimpaired, for where one or more remedies are available, a party cannot be deprived of his right to elect which remedy he will pursue.

Hooper-Mankin Fuel Co. v. Railway Co., 30 Fed. 2nd, 500 (1929).

As the manifest effect and consequence of the order appealed from is to force the petitioner to challenge the

validity of the transaction in the equity proceedings before an auditor or similar officer, it follows *ex necessitate* that he is by that means deprived of a jury trial, which he elects to pursue, as guaranteed to him by the Seventh Amendment, for which reason, the order is erroneous and should be reversed.

2. That the proceedings in the District Court giving rise to the controversy were illegally collusive.

(Specification of Errors 1-2-3-4.)

The Circuit Court of Appeals in its opinion has pointed out (R. 24) that Robinson could not have obtained a receiver for himself in any State Court of Pennsylvania by force of

Hogsett v. Thompson, 258 Pa. 85 (1917),

no more could he have done so in a Federal Court

In re Richardson's Est., 294 Fed. 349 (1923).

Robinson therefore caused the creation of his Delaware corporation to escape the consequences of this state of the law, both local and Federal, for the transparent reason of conferring jurisdiction on the ground of diversity of citizenship upon the Federal Court in the Eastern District of Pennsylvania. This we maintain is expressly determined by Circuit Court of Appeals by its opinion (R. 24). In the light of such direct finding, the operation of Section 37 of the Judicial Code is made manifest. This reads as follows:

> "If in any suit commenced in a District Court or removed from a State Court to a District Court of the United States, it shall appear to the satisfaction of said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said

District Court, *or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein,* but shall dismiss the suit or remand it to the Court from which it was removed as justice may require, and shall make such order as to costs as shall be just."

Judicial Code, Sec. 37;
28 USCA, Sec. 80.

This section is practically an identical re-enactment of similar statutes which the Supreme Court of the United States has had occasion to construe and apply in many cases. Of these, those directly affecting the situation now made apparent by this Record are the cases of

Miller & Lux vs. East Side Canal Co., 211 U. S. 293, (1908);

Southern Realty Co. vs. Walker, 211 U. S. 603, (1909);

Lehigh Mining Co. vs. Kelly, 160 U. S. 327, (1895).

In *Miller & Lux v. East Side Canal Co., supra,* a California corporation instituted a bill in equity in a Court of that state against another California corporation, and thereafter caused the organization of a Nevada corporation, taking all of its stock, and conveying all its property to the new corporation. The suit in the State Court was discontinued, and a bill filed by the Nevada corporation in the United States Court, jurisdiction being obtained by the diversity of citizenship thus created. The Supreme Court held that the action was collusive, under the Statute, to "*invoke the jurisdiction of the Federal Court and avoid the determination of the rights of the parties in the Courts of the State* (p. 304);" and affirmed a decree dismissing the bill.

This cited case we think sufficiently coincides with the case now before this Court upon the facts as to justify the belief that it truly governs and makes necessary the same legal result here as there vindicated. The perplexing feature as to this limited aspect of the matter, in the light of the naked disclosure of Robinson's motives (R. 24) as unreservedly declared by the Circuit Court of Appeals, is to divine the reason why that Court so signally failed in its duty as prescribed by this Court, holding that, where the case made by the record falls within the purview of Section 37 of the Judicial Code, the Court of its own motion should raise the jurisdictional question and follow the mandate of this section to dismiss the proceedings.

Northern Pacific Steamship Co. v. Soley, 257 U. S. 221 (1921)

and the fact the situation was apparently ignored by the District Court affords no excuse to the Circuit Court of Appeals for following suit, and that without clamor by any litigant.

If it be asserted that the petitioner never moved for a dismissal as implied by Section 37 of the Judicial Code, there is a two-fold answer. The first is, if as he shall hereafter maintain and as is found by the Circuit Court of Appeals by its opinion, that Robinson's maneuvers were *to hold the petitioner at bay,* results in a legal fraud, as the petitioner shall maintain, then as to him the order complained of is a complete nullity because as declared by this Court "Hence the rule that whenever a judgment or decree is procured through fraud of either of the parties *or by collusion of both* for the *purpose of defrauding some third person,* such *third person* may escape from the injury thus attempted by showing *even in a collateral proceeding* the fraud or collusion by which the judgment was *obtained.*"

Michaels v. Post, 21 Wall 426-427 (1874).
No. Pacific Rwy. Co. v. Boyd, 177 Fed. 804 (1910) affirmed 228 U. S. 482 (1912).
Black Judgments, Sec. 293 2nd Ed.

So that if the petitioner's proceeding here be deemed collateral, he admittedly shows that the receivership was obtained collusively by Robinson the complainant and his creature the Delaware corporation the defendant, for the purpose of defrauding the petitioner by a legal fraud. In proof of this we need do nothing but refer once more to opinion of the Circuit Court of Appeals (R. 23-24) where the admitted facts of the situation appear in all their nakedness with the legal consequence that as to him these proceedings were a nullity.

The second answer is, that if the petitioner had sought relief by a direct motion for dismissal it would have rightfully been denied him *because such relief would have been too broad.* The record (R. 6) plainly shows that out of total assets amounting to $274,315.82 the amount of *tangible personal property* comprised therein was $52,338.19 (inventory) and this was all which by the Pennsylvania practice could be seized and sold by a writ of *fieri facias* in the first instance, which was the writ the petitioner prayed for. Hence it was necessary and proper that there must and should be a custodian for the rest of Robinson's assets in the Delaware corporation's possession amounting to $221,977.63, *which the petitioner never sought to reach,* when other good legal or equitable reasons being made to appear, would justify a receivership. *But the intangible assets of Robinson concern the petitioner not at all* the others being fifty fold sufficient to pay Shapiro, consequently had the latter sought more by a complete annihilation of the receivership by direct attack, if his was not such, he should have received a deserved rebuff and there-

fore his adherence to the course indicated by Wiswall v. Sampson, supra.

Now independently of Sec. 37, the performance of Robinson is equally vicious. To repeat the Court of Appeals has found that a Pennsylvania individual debtor cannot be put in receivership, either by himself or by his creditors. If then, that be the Pennsylvania law and the Federal Law as well, the present Record shows that the object sought and achieved by the machinations of Robinson by incorporating and entering the District Court were plainly to evade the consequences of that law and to procure a receiver for himself in a corporate guise, which the cases last cited *ante* pp. 14-11 show may and should readily be torn aside and penetrated and their true character exposed. This fraud upon the Pennsylvania Law being so demonstrated, it is entirely certain that such a proceeding presents a justiciable wrong of sufficient importance to procure the intervention of a Court of Equity.

Cole vs. Cunningham, 133 U. S. 107, (1889);
Sweeny vs. Hunter, 145 Pa. 373, (1891);
Galbraith vs. Rutter, 20 Pa. S. C. 556, (1902).

Hence we say that a person who is guilty of such acts as warrant equitable interference can by no process of reasoning be deemed honest or having an honest purpose, as the Circuit Court of Appeals holds (R. 24) *particularly not if that person, as also found by that Court, is desiring to preserve his own property against creditors whose judgments are unquestioned,* for it must never be lost sight of, as declared by this Court, that to deprive a party of the fruits of a judgment at law it must be against conscience that he should enjoy them. The party complaining must show that he has more equity than the party in whose favor the law has decided.

Brashear vs. West, 7 Peters 608 (1833).

How can it be against conscience for a man possessing a hundred thousand dollars to pay a judgment creditor whom he owes a thousand dollars, and how can anybody complain when the debtor who after paying all his debts except one retains a hundred thousand dollars shall not pay that one? It is perfectly certain therefore, that the acts which the petitioner complains are a flagrant violation of the law as embodied in Judicial Code, Sec. 37, as well as general legal principles.

Indeed to us it seems quite impossible to be otherwise, if the situation be, as stated by Mr. Justice Brewer speaking for this Court in

South Dakota v. North Carolina, 192 U. S. 320 (1903),

He says:

> "The award of execution is a part, and an essential part of every judgment passed by a Court exercising judicial power. *It is no judgment in the legal sense of the term without it.* Without such an award, the judgment will be inoperative and nugatory, leaving the party aggrieved without a remedy."

carrying with it an earlier corollary that

> "So long as the judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged and *gives him a right to process to execute the judgment.*"

Voorhees v. Bank of the United States, 10 Peters 473 (1836).

Huff v. Hutchinson, 14 Howard 588 (1872).

We believe therefore to have established that the proceedings for the receivership herein are demonstrated to be illegally collusive, a vice that renders them as to the present petitioner no barrier to the success of the remedy

he sought in the District Court, making certain that upon this ground the order appealed from ought to be reversed.

3. That the conveyance assailed in the controversy was fraudulent under the Uniform Fraudulent Conveyance Act of Pennsylvania and under 13 Elizabeth in force in that State.

(SPECIFICATION OF ERRORS 1-2-3-4.)

It will be a vain search of the opinion of the Circuit Court of Appeals for the slightest intimation bearing upon the subject incorporated in this heading, notwithstanding *it was the express foundation of the petitioner's claim in all Courts below* (R. p. 12-13-14). True it is, that it is there stated that petitioner made no attempt to prove fraud, as to which see argument *post* p. 37 *et seq.*

So far as we understand this statement we believe the Court intended to imply that the petitioner attempted to prove *no fraud in fact.* If so, that is quite correct.

The principal reason for this seeming omission among others is that the facts found by the Circuit Court of Appeals (R. p. 24) and admitted by respondents' answer (R. p. 16 *et seq.) establish fraud in law.* The very best the respondents' answer sets up, admitting all the facts averred and found by the Circuit Court of Appeals, *was a denial of fraudulent intent* neither more nor less. In that situation, we with all propriety invoke Mr. Justice Bradley, in

Lathrop v. Drake, 91 U. S. 520 (1875)

where that Judge writes:

> *"The general denial of fraud in the answer of the defendants is the equivalent to nothing more than a denial of a conclusion of law."*

So that question presented by the respondents' answer raises and raised merely questions of law. In the main these arise upon Uniform Fraudulent Conveyance Act of Pennsylvania and 13 Elizabeth in force in that State.

The Uniform Fraudulent Conveyance Act in force in Pennsylvania, Acts of Assembly of the Commonwealth of Pennsylvania, May 21, 1921, P. L. 1046-1047, Purdon's Digest Title 39, Sections 354-355 in Section 5, reads as follows:

> "Every conveyance made without fair consideration when the person making it is engaged, or is about to engage, in a business or transaction for which the property remaining in his hands after conveyance is an unreasonably small capital, is fraudulent as to creditors and other persons who may become creditors during the continuance of such business or transaction *without regard to his actual intent.*"

And in Section 4 reads as follows:

> "Every conveyance made, and every obligation incurred, by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors *without regard to his actual intent,* if the conveyance is made or obligation is incurred without a fair consideration."

A plain reading, therefore, of these Sections, especially the portions of them which we have italicized, makes it certain that as to a man in business as Robinson most certainly was, *the actual intent of the grantor is wholly immaterial.*

The Circuit Court of Appeals (R. 24) directly finds that these conveyances by Robinson transmuted all his assets into the entire incorporeal stock issue of the Delaware corporation brought into being for this very purpose, demonstrating the presence of the double weakness of the lack of fair or any consideration, and the entire stripping of Robinson of all his capital, *the precise conditions proscribed by both of the above quoted sections of Uniform Fraudulent Conveyance Law.*

In this connection we do not ignore that part of the opinion of the Court below which refers to the assumption by the Delaware corporation of all of Robinson's debts including the petitioner's. Of what consequence may this be? We say none whatever. It is self evident we think that all that possibly could be achieved by this phase of the scheme had it been consummated, was to work a substitution of debtors, the Delaware corporation in lieu of Robinson but in that development that Circuit Court appears wholly to have forgotten *that there can be no legal substition of debtors without the consent of the creditor.*

Coyle v. Coal Co., 289 Fed. 435 (1923).
In re Bonk, 268 Fed. 1015 (1920).
Illinois Car Co. v. Linstroth Wagon Co., 112 Fed. 740-741 (1902).
Vance v. Clay Manufacturing Co., 82 Fed. 251 (1897).

And the Pennsylvania Law is the same.

Jones v. Casualty Co., 255 Pa. 573 (1917).
McCartney v. Kipp, 171 Pa. 647-648 (1895).

And if this record conclusively establishes anything, it establishes the fact that *Shapiro, the petitioner, never consented to any such substitution.*

Nor does the respondents' position improve in the light of 13 Elizabeth in force in Pennsylvania. As applied to facts disclosed by this record the Supreme Court of Pennsylvania has stated in

Zerbe v. Miller, 16 Pa. 488-497 (1851)

that:

"The consideration of a sale may amount to the value of the land sold, *and yet the sale be fraudulent as against creditors, because such sale may delay, hinder, and obstruct them in the collection of their*

*debts. And a sale for value may not only delay and hinder them but may also be made for that very purpose and intent * * * It is the intent that gives character to the transaction; and when the acts corresponds with the intent, and both concur in delay and hindering creditors, the deed is void."*

The same Court speaking in

Hennon v. McClane, 88 Pa. 219-222 (1878)

reiterated this principal in unmistakable language thus:

"The Statute of 13 Eliz. being directed against conveyances that *hinder and delay* (the italics are the court's) creditors, * * * bargains which * * * tie up property out of reach of creditors, preventing the collection of their debts in the ordinary course of law, are held to be against the Statute, and fraudulent in law".

These quotations accurately and graphically describe the operation of the scheme of Robinson and his cohorts upon this record making certain that by virtue of 13 Elizabeth embodied in the common law of Pennsylvania must strike it down as palpably illegal. And so it is everywhere.

That fraud exists under these circumstances has been squarely decided by the Circuit Court of Appeals for the Second Circuit, on facts almost identical with ours.

In re: American Candy Mfg. Co., 256 Fed. 87 (1919)

a corporation conveyed all its assets to another corporation, the latter assuming its debts, the former thus becoming insolvent. Bankruptcy of the second corporation followed; and a creditor of the first, who had obtained his judgment after the conveyance, petitioned to set aside sufficient of the bankrupt's property to pay his debt. All the other creditors

had filed claims against the bankrupt, and had not joined in the petition. Judge Hough held the conveyance fraudulent, and granted the relief prayed for, pointing out that the petitioner might have levied an attachment on the property fraudulently conveyed. And Judge Hand, in a similar case

Empire Lighting Fixture Co. v. Practical Lighting Fixture Co., 20 Fed. 2nd 295 (1924)

pointed out that *an intent to delay will defeat such a conveyance as effectively as an intent to defraud;* and that no consideration will support a fraudulent conveyance. The cases are under a New York Statute, but express the universal common law principle.

Nothing could be surer than the presence of intent to delay on the part of Robinson and his co-conspirators upon this record for it is expressly found by the Circuit Court of Appeals (R. 24) in this fashion. "So * * * * * * he followed the only course open to him to effect his honest purpose *of preventing the sacrifice of his property thwarting all efforts of his creditors* to get preferences and *ensuring the continuance and gradual liquidation of his business* and an equal distribution among all his creditors." No stronger phrasing could be adapted to show that the primary and paramount motive of Robinson was delay, delay and more delay, precisely the condition reprehended by all authorities since it is a maxim that *"Qui serius solvit, minus solvit"*

Louisiana v. New Orleans, 102 U. S. 207 (1880),

he who pays late, pays less, and makes increasingly astonishing the accolade placed on Robinson and his professional co-workers by the Court below as "honest". The difficulty here may consist in the fact that this adjective is there employed in a sense with which the rest of us are wholly unfamiliar, always aggravated by the knowledge

that Robinson had one hundred thousand dollars and would not pay the one thousand owed to the petitioner.

Consistent with the foregoing, as we deal here with a Pennsylvania transaction, we revert again to the Pennsylvania law there to find its law in complete harmony with what has gone before. This is fixed by the cases of

Montgomery Web Co. v. Dienelt, 133 Pa. 585 (1890),

Atlas Portland Cement Co. v. American Brick Co., 280 Pa. 449 (1924),

Delphia Mills Co. v. Richards, 62 Pa. S. C. 9 (1915),

which cases, upon the facts and for the remedies sought, are in no material aspect to be distinguished from the case made in the present record. In those cases, the offended creditor successfully broke through the screen of corporate formation of his debtor's existing business, which is precisely what the petitioner contends for in the present case, and it is of more than usual significance that in the cases last cited, the instrument of attack employed was identical with that which in the present instance was denied to the petitioner, to wit: The issuance of a *fieri facias* and consequent property claim and Sheriff's Interpleader, and ought to have been the sequel in the Court below, for the machinery on Sheriff's Interpleader seems without abatement to apply in the Federal Courts in Pennsylvania, as well as in the State Courts.

United States v. Kinney, 264 Fed. 542 (1920).

Nor need the inventors of the contrivance now under attack comfort themselves with the notion that they have here created a novelty, for we think it plain that long before their brain child was begotten collusive receiverships

have been held failures as devices to hinder, delay or defraud creditors.

Metcalf v. Moses, 161 N. Y. 587, 56 N. E. 67 (1900),

Schloss v. Schloss, 14 App. Div. 333, 43 N. Y. Supp. 788 (1897),

Link Belt Machinery Co. v. Hughes, 195 Ill. 413, 63 N. E. 186 (1902),

Manhattan Trust Co. v. Seattle Coal Co., 16 Wash. 499, 48 Pac. 333 (1897),

Gooch v. Haworth, supra.

Russell v. East Anglian Rwy. Co., supra.

We therefore submit that the transaction manifest upon this record is contrary to Uniform Fraudulent Conveyance Act of Pennsylvania and 13 Elizabeth in force in that State. It also violates the Sales in Bulk Law of that State concerning which for reasons hereinafter appearing we shall write at another place *post* p. 46.

However, at this place it is sufficient to declare that upon the two phases of the law just considered the order appealed from is wrong and should be reversed.

4. That the receivers' possession is not a legal obstacle to prevent attack upon the alleged fraudulent character of the transaction by customary procedural instruments employed in practice in the State where the transaction is assailed.

(Specification of Errors 1, 2, 3, and 4.)

By the Pennsylvania practice, upon the facts shown by this record, the approved instrument of attack was the issuance of and seizure by writ of *fieri facias* against the tangible personal property sought.

Montgomery Web Co. v. Dienelt, supra,

Atlas Portland Cement Co. v. American Brick Co., supra,

Delphia Mills Co. v. Richards, supra,

because in that State:

> "A conveyance of property made by a debtor to defraud creditors is void as to them * * * and the title for the purpose of enabling creditors to enforce their debts remains in the grantor * * * A judgment creditor is allowed to levy upon and sell any title * * * alleged to be in the grantor * * *"
>
> *American Trust Co. v. Kaufman,* 276 Pa. 39 (1927),

effecting a complete reconciliation with the approved practice prescribed by *Wiswall v. Sampson, ante,* p. 6.

So that in the present instance the approved procedural instrument was sought to be employed.

Now certainly the Receivers' title or rather, right of possession, added nothing to the title of the Delaware corporation in which place they stood, for by

> *Fosdick v. Schall,* 99 U. S. 251 (1878):
>
> "The possession taken by the receiver * * * adds nothing to the previously existing title * * *."
>
> *In re American Candy Mfg. Co.,* cited *supra,* p. 89:
>
> "The trustee in bankruptcy stands in the shoes of the (bankrupt which) * * * took nothing by the conveyance, except what remained after accounting to * * * non-consenting creditors."

And to like effect

> *Grant v. Insurance Co.,* 106 U. S. 432 (1882).

So that there is singular relevancy in what is found in a most recent decision of this court declaring that:

> "This Court has had occasion to point out the *abuses* that can arise from *friendly receiverships forestalling the normal process of administration in bankruptcy and enabling a tottering business to continue while creditors are held at bay* * * *. Receiverships

for conservation *have at times* a legitimate function, but they are to be watched with jealous eyes lest their function be perverted. * * * To protect through a receiver the corporate privilege and use the appointment as a barrier to the collection of a tax that should accompany enjoyment would be an injustice to the State and *a reproach to equity.*"

Cardozo, J., in:

Michigan v. Michigan Trust Co., May 16, 1932, October Term 1931, No. 598, not yet officially reported.

The italics are ours. True it is that the facts of that case are superficially different from those present in this record. If, however, in the quotation made we substitute "debt" for "tax" and "petitioner" for "state" complete identity is established and the vigorous criticism of Cardozo, J., there operates to the entire annihilation of Respondents' defense here, for what does the record show but an attempt to forestall processes of bankruptcy and enable the continuance of a business while the creditors are held at bay? Moreover would not the continuance of the status complained of operate as against the petitioner *as an indefinite stay of execution*, unconstitutional in itself

Edwards v. Kearzey, 96 U. S. 601-602 (1877)
Cooley Constitutional Limitations 8th Ed. p. 597

and hence inaccessible to Robinson with the sequel that as crystallized in the maxim *Nemo potest facere per obliquum quod not potest facere per directum*—"What cannot be done directly cannot be done indirectly."

Cummings v. Missouri, 4 Wall. 325 (1886).
Clarke v. Clarke, 178 U. S. 191-192 (1889).
The Commercen, 1 Wheat. 382 (1816).

Macallen Co. vs. Massachusetts, 279 U. S. 629 (1928).

Langdon v. Branch, 37 Fed. 463 (1888).

It follows, therefore, all other factors in the case being unimpaired, the presence of the collusive receivership here presents no bar to the relief sought by the petitioner for which reason the order appealed from ought to be reversed.

5. That a solvent debtor as to any of his creditors cannot create an illegal preference.

(Specifications of Error 1, 2, 3, 4.)

The dominant motif of the opinion (R. 23 *et seq.*) delivered in this cause by the Court below is "preference". By a singular famine in adjectives, the writer of that opinion has nowhere described the "preference" he assumes to reprehend as an illegal or legal preference. Since, however, we are in a juristic environment when we assume to consider this opinion, we feel we do no violence to the word used when we assume that what the writing judge intended by the naked word "preference" he meant "illegal preference" for if it is otherwise, it is hard to understand that anything is meant. Using then the phrase "illegal preference" in place and stead of the word "preference" when it appears in the opinion, how does the matter stand? We submit that so far as "illegal preference" is concerned with complete deference to the Court below, its conclusions as contained in the opinion as a legal proposition are wholly insupportable. We make this seemingly bold assertion because we are convinced *that upon the state of the record as disclosed by the very opinion itself, "illegal preference" as to the petitioner was a legal impossibility.*

We shall deal with this phase of the matter, though that Court has failed to do so, in its opinion in its two aspects.

First as regards the National Bankruptcy Act and secondly independently of that act.

As to the National Bankruptcy Act that statute provides:

"A person shall be deemed to have given a preference if, *being insolvent,* he has within four months before the filing of the petition, or after the filing of the petition and before adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect or enforcement of such judgment or transfer will be to enable anyone of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required or permitted."

Sec. 60A, National Bankruptcy Act, as amended May 27, 1926, 44 Stat. Chap. 406, Sec. 14, 11 USCA Sec. 96.

The same Statute again provides:

"Acts of Bankruptcy by a person shall consist of his having * * * (3) suffered or permitted *while insolvent* any creditor to obtain a preference through legal proceedings and not having at least five days before a sale or other disposition of any property effected by such preference vacated or discharged such preference; or (4) suffered or permitted *while insolvent,* any creditor to obtain through legal proceedings any levy, attachment, judgment or other lien and not having vacated or discharged the same within 30 days from the date such levy, attachment, judgment, or

other lien was obtained; or (5) made a general assignment for the benefit of his creditors, or *while insolvent* a receiver or trustee has been appointed or put in charge of his property; or (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground * * *."

Sec. 3, National Bankruptcy Act, as amended May 27, 1926, 44 Stat. 662 Chap. 406 11 USCA Sec. 21.

Recurring now to the opinion, the Court referring to Robinson, the debtor, we use the exact words to avoid the possibility of error, found *"He was solvent to the extent of a hundred thousand dollars."* (R. 23.)

This being a fundamental and overpowering finding, as we view it, we submit with the utmost emphasis measured by the express words of the Bankruptcy Act above quoted that no illegal preference could in any degree arise by force of the provisions of that act by anything which Shapiro, the creditor petitioner, might have done by way of enforcing his judgment by any sort of execution, because the sections quoted show *that preference by legal proceedings can only come into being while the debtor is insolvent.* To hold the contrary simply tears out of the sections quoted the express words of the statute and consequently, as may well be expected, all the authorities upon the subject hold that there can be no illegal preference under the Bankruptcy Act unless and until *the debtor be insolvent and that a solvent debtor cannot create a preference.*

Remington Bankruptcy, Sec. 1739, 3rd Ed.
Collier Bankruptcy, 13th Ed., Vol. 2, P. 1250.

Citing a host of cases from all the Circuits in the United States.

Thus it is manifest that so far as the National Bankruptcy Act may be thought to be involved, as it bears upon an illegal preference in the present record, the conclusion of that Court is at variance with all authorities.

As to the law independent of the Bankruptcy Act.

We assert with equal confidence that there can be no preference in the law removed from the zone of Bankruptcy where the debtor is not insolvent. In short that *insolvency* in regard to relations between debtor and creditor is the heart of every illegal preference, the latter being incapable of existing without the former. This is shown in its most simple form by the legal definition of the word "preference" itself, thus "Preference—The paying or securing to one or more of his creditors by an *insolvent* debtor, the whole or part of their claims to the exclusion of the rest."

Bouvier Law Dictionary, 3rd Ed. Vol. 3, P. 2662.

Thus it is made manifest that no correct conception of preference in a legal sense can be entertained where the debtor involved *is solvent, as Robinson in the present case was, to the extent of a hundred thousand dollars, as found by the Court itself.*

In this connection it is but fair to observe that this element of preference is an innovation brought into the Record by the Court of Appeals alone, for the District Court in its comprehensive silence, necessarily made no reference to it, nor did the receivers by their answer ever suggest its presence in the Record.

We feel therefore that so far as the Statute and the General Law is concerned in the very essence of the case, neither the creditor Shapiro could receive nor the debtor Robinson give a preference, in the light of the *legally in-*

surmountable solvency of Robinson. This is emphasized when we look into the authorities touching preference when removed from statutory considerations. What we mean by this is to reiterate and reiterate that both by the Law of the United States and the State of Pennsylvania where this transaction was had a preference even if Shapiro would have had the good fortune to acquire it, according to his undoubted clear legal and equitable right, no legal or equitable objection against it could be rightfully interposed, for at common law the obtaining of a preference by a creditor is entirely legal.

Huntley v. Kingman, 152 U. S. 527 (1894).
Blennerhassett v. Sherman, 105 U. S. 117 (1881).
May v. Tenney, 148 U. S. 60 (1892).
Crawford v. Neal, 144 U. S. 595 (1891).
Tompkins v. Wheeler, 16 Peters 116 (1842).
Brooks v. Marbury, 11 Wheat. 78 (1826).
Clarke v. White, 12 Peters 178 (1838).
Brashear v. West, 7 Peters 608 (1833).
Magniac v. Thompson, 7 Peters 348 (1833).

We would remark that the rule applies in equity without abatement for *Crawford v. Neal, supra; Tompkins v. Wheeler, supra; Clarke v. White, supra,* and *Brashear v. West, supra,* are all cases in equity.

The law of Pennsylvania is the same as is established by
Love v. Clayton, 287 Pa. 215 (1926).
Schimmel v. Cohen, 275 Pa. 121 (1922).
Smith v. Keener, 270 Pa. 582 (1921).

A reader of the opinion of the Court of Appeals in this matter cannot escape gathering the impression that the Circuit Court wholly approves of the order of the District Court as an act which prevented the commission by the creditor Shapiro of some inequitable, unjust or other base

proceeding for which Shapiro should be duly reproved. It is submitted that this attitude is completely at variance with the theory of the Supreme Court of the United States, which we suppose is still controlling in the Court below, when the former was dealing with the situation there thought to be censurable. The Supreme Court in *Blennerhassett v. Sherman, supra,* speaking by Mr. Justice Woods, p. 117, declared,

> "It is not to be disputed that except as forbidden by the Bankrupt Law, the debtor has a right to prefer one creditor over another and *that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests.*"

Thus it appears that the view of this Court hardly coincides with those of the Court below in a similar situation, nor can that Court's attitude of criticism of the petitioner be justified so far as it seems to disapprove of Shapiro's persistent efforts to collect the whole of his debt approximating a thousand dollars from *his debtor who has a hundred thousand dollars.* We believe the correct attitude of the law in this regard is expressed in the maxim

Vigilantibus et non dormientibus leges subvieniunt.

Lupton v. Janney, 13 Peters 386 (1839).
New York v. Pine, 185 U. S. 98 (1902).
Hawkins v. Barney, 5 Peters 466 (1831).
Ricard v. Williams, 7 Wheat. 116 (1822).
Magee v. Insurance Co., 92 U. S. 98 (1875).

The law assists the diligent and not those who sleep on their rights.

It follows therefore that so far as the judgment of this Court of Appeals affirming the District Court below is based upon the theory of illegal preference it is plainly erroneous and the order should be reversed so far as it is based upon this mistaken theory.

As we approach the conclusion of this phase of the matter we again direct this Court's special attention that the contention of "preference" or "illegal preference" never was made or suggested in this case until the Circuit Court of Appeals in this case rendered its opinion on December 31, 1931. The District Court being wholly silent, necessarily did not do so. The Petitioner having no incentive, naturally did not do so. The Respondents, as measured by their answer (R. 16 *et seq.*) never dreamt of it. Consequently it is the invention of the Circuit Court of Appeals, as a device for justifying the unjustifiable and therefore creates a situation in our judgment entirely parallel to that producing the criticism of this Court in

Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257-267 (1909);

where it is held that a Circuit Court of Appeals which decides a cause upon a ground urged by neither litigant in that Court or in the Court below, deprives the losing party of his day in court upon that issue and renders its judgment erroneous on that account. This must be especially true in the present instance, where this error is much enhanced by the fact, that upon discovery, this fallacy was made one of the specific subjects for reconsideration upon the Petition for Rehearing in that Court, being points 1a-1b of that petition filed, and denied without further comment, January 28, 1932. (R. 26.)

Thus we conclude the presentation of the five points raised by the Petition for Certiorari and proceed to

B.

Points apparent from the face of the record not pressed by the Petition for Certiorari.

Story Parchment Co. v. Paterson Parchment Paper Co., ante, p. 3.

1. Is it the duty of a judge in a Federal Court of the first instance in determining a matter falling within his jurisdiction to place upon the record by some method the reasons for his decision?

(Specification of Error 5.)

The petitioner has no means of knowing by what gauge the District Court might determine the relative importance of a matter before it, and, therefore, in the encompassing silence of its record, is unable to state whether or not that Court deemed the matter, which has begotten his petition, of any importance whatever. However that may be, the petitioner regards it of importance, since the inevitable effect of the order appealed from has postponed for the past, and promises to postpone indefinitely for the future, the collection of the sum of $1007.65 owing to him upon circumstances to which no legal defence has ever been suggested and ample means of payment exist, and, since he has not yet reached that state of affluence where the amount involved is of no significance, upon personal grounds alone, he regards the matter important enough, to say nothing of the interest of the litigating public, whose interest he makes no present pretense of vindicating, to know just how Courts in a given instance act, and why.

So that the petitioner does not regard it in any sense impertinent to complain that in this case, as in every case, reasons for judicial action should be made to appear upon the record, for it is by this means alone that Courts may hope to escape the implication that they act arbitrarily in the nature of imperial fiats, and for the better motive for simplifying the tasks of Courts of Review in cases such as the present case, which, as the argument preceding has revealed, is free of all frivolous and unsubstantial legal questions, and thus evade the necessity of placing upon the litigant, as here, the increasingly difficult burden of shooting at an invisible target.

Our plaint in this regard has well been anticipated by this Court, speaking by Mr. Justice Brandeis, where he writes:

> "Unless the opinion indicating the grounds of decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the Appellate Court. This is particularly true *where the case is in equity* and a decree is entered upon a hearing involving complicated facts. *For, being in equity,* matters of fact as well as law are reviewable; and the reviewable issues of law are sharply defined by request for rulings. *The failure to accompany the decree by an opinion may thus deprive litigants of exercising a sound judgment on the propriety of an appeal; and the Appellate Court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case and will ordinarily be subjected to much unnecessary labor.*"
>
> *Virginian Railway Co. v. U. S.,* 272 U. S. 675 (1926).

Certainly nothing that the petitioner could say in the present instance can be more apt to or descriptive of the situation in the present record in the District Court than what is here quoted, and, therefore, nothing upon this score will be attempted to be added.

Indeed, it is altogether plain that a record which discloses no reasons for decision, is in such form as to preclude action by an Appellate Court *requiring the decree to be set aside* to enable the Court below to state its reasons upon the record.

> *Railroad Commission v. Maxcy,* 281 U. S. 82 (1930).

2. By what methods of procedure are issues of fact in the Eastern District of Pennsylvania arising upon motions in equity proceedings to be determined?

(SPECIFICATION OF ERRORS 1, 2, 3, 4, 5.)

Among the many technical heartaches begotten by this record, none is more painful to record than that embodied in the language of the Circuit Court of Appeals (R. 24-25):

> "He presented a petition to the Court below, alleging the chartering of the company, the transfer of Robinson's property to it, the filing of the bill, the appointment of receivers were a fraud—assertions which were denied by answer—*of which unwarranted statements no proof whatever was made.*"

If it should appear that counsel are unduly affected by the italicized portion of this quotation, a part of their indignation and disapproval can well be understood when it is pointed out that the 6th question they propounded to the Court of Appeals was as follows:

> "6. By what method of procedure in the Eastern District of Pennsylvania are issues of fact, arising upon motions begotten by equity proceedings, to be determined?"

Petitioner's Brief in the Circuit Court of Appeals, p. 35.

The question was begotten in this manner:

Sec. 2 of Rule 8 of District Court (at law) reads as follows:

> "Depositions may be taken upon forty-eight hours' notice before an examiner or commissioner appointed by the court or before any person authorized under Acts of Congress to take evidence * * *"

Rule 8, Sec. 2 of Rules of District Court, E. D. Pa.

Federal Equity Rule 47 provides as follows:

"The court upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses to be used before the court or upon reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order * * *."

Federal Equity Rule 47.

And Federal Equity Rule 46 reads thus:

"In all trials in equity the testimony of witnesses shall be taken orally in open court except as otherwise provided by statute or these rules * * *."

Federal Equity Rule 46.

As a result of that state of procedure and *the fact the Respondent's answer was filed at the opening of Court at the bar upon the return day of rule and not earlier,* the Petitioner then in support of his petition handed to the presiding judge (Kirkpatrick, D. J.) his brief, the introductory portion of which read, as follows:

"As this matter develops, we believe it will be found that the most bothersome feature that it presents is a precedent determination of the manner by which the pending matter is to be adjudicated. By this, we mean that Counsel for the petitioner has not, at this time, determined what course to pursue, because of the uncertainties of the situation now to be noticed.

"It will be observed that this is a suit in equity, and, therefore, the procedure at law, so far as it may be governed by particular Rules prevailing in this district, can have no application. What we mean in this connection is that Section 2 of Rule 8 of the Rules of this District, pertaining to suits at law, make provi-

sion for the taking of depositions in a case where that is desirable, and we think that if such a Rule were applicable to the present case, the situation involved in it would be such to make the taking of depositions essential."

"But here we meet difficulties, and they arise in the main from the belief that the Federal Equity Rules do or should apply to the situation presently at the Bar."

"If that is true, the merest reference to Federal Equity Rule 47 makes it plain that the taking of depositions is exceptional, and that, by force of Federal Equity Rule 46, the general policy of the equity practice is to take the testimony in open Court. Hence, we incline to the opinion that so far as the present application may involve issues of fact, testimony in support thereof should be taken in open Court; but this inclination affords no positive solution of the question now propounded, and this because it seems that upon a motion in an equity case, the mode of trial is discretionary with the Court.

Frances Investment Co. v. Thomason, 11 Fed. 2nd 229 (1926).

42 Corpus Juris 506, Sec. 130."

"Especially so since the determination of questions of fact on *ex parte* affidavits in equity causes is not favored in the Federal Courts.

Decorative Stone Co. v. Building Trades Council, 13 Fed. 2nd 123 (1926)."

"So that, if the Court should determine there are issues of fact arising upon the record as made, the petitioner does not want to fall between stools in the selection of a course of procedure, but shall expect the Court to indicate the method of trial of these issues, as

is declared in *Frances Investment Company v. Thomason (supra).*"

"Even in these less important aspects of the matter the Court below maintained its unexplainable taciturnity. It gave no indication how the issue of fact should be tried, assuming that there was an issue of fact, and, therefore, we stand in the same enshrouding ignorance at this late stage of the proceedings as we did at their inception, and therefore, elect not to let the opportunity pass to obtain from this Court some declaration for the future guidance of the profession in this regard."

The foregoing excerpt is a literal copy of pages 35-36-37 of the Petitioner's Brief in the Circuit Court of Appeals so that in addition, in the partisan minds of counsel, to being an unjust and unfair statement of the case touching this phase of it, it likewise makes baffling and incomprehensible the position of the Circuit Court of Appeals *so far as it asserts any failure on the part of the Petitioner to prove the averments of his petition,* and more, because this striking vice is augmented by the fact, that though this situation was again directly brought to that Court's attention by reason (6 a) of the Petition for rehearing which by the Practice of this Court, the Clerk does not print, (R. 26) it never even attempted to cure the error so palpable, in the light of the true situation, always actually before it.

3. Can the personal attributes of counsel promoting a given legal situation in any manner effect the legality thereof?

(Specification of Error 1.)

4. Does the present record disclose the action of counsel involved to be either able or honest as tested by acceptable standards?

(Specification of Error 1.)

We deplore exceedingly that the Court of Appeals in delivering its opinion in this matter has found it necessary

to state that Robinson in the perpetration of his fraudulent scheme did so "Under the advice of honest and able counsel." (R. 24.) Certainly nothing that the Petitioner has ever stated in the slightest degree impugned or criticized the acts or advice of any attorney opposed to him or in the service of Robinson, whatever ideas might be entertained upon the subject. Thus it would appear that the expression of the Court now pointed out is a spontaneous defense of someone against a non-existing accusation and begets the misgivings that all similar situations engender, for certainly the prickings of some attorney's conscience are not to be laid at our door. It is for this reason therefore that we would have much preferred the quoted statement to have been entirely omitted from the opinion because its presence necessarily calls upon us to test its justification upon the facts of the record. We understand it to be a fundamental of appellate jurisdiction that the reviewing Court is confined to matter apparent only on the face of the Record.

Suydam vs. Williamson, 20 Howard 432 (1837).
Evans vs. Stettnisch, 149 U. S. 607 (1892).

As we read the Record, *there is not an averment therein which mentions or reveals who was Robinson's attorney in the promotion of his fraudulent enterprise prior to the filing of the bill herein* so we can have no means of knowing how Court of Appeals ascertained that fact. However, that may be if Robinson's scheme was promoted by an attorney, and dehors the record, we know this, we wonder how this information touching his identity being withheld by the Record, can justify the Court in the light of such concealment, in holding the attorney either to be honest or able or both. Is it possible that this conclusion is based on the fact that the fraudulent scheme which was concocted by an attorney having been brought to a successful conclusion proves the attorney's honesty

and ability, ergo, that an attorney who unsuccessfully opposed it is dishonest or incapable! Would not such an attempt at classification require a complete certification of the personnel that comprise the Bar of any Court, and would not such certification or classification be a boon to every rogue in the laity who desiring to promote dishonest litigation, need only to employ such attorneys whom in the Court's judgment were honest and capable and profit accordingly? What a potential public menace is this? In truth we believe the departure in the present instance touching the ability and morals of attorneys appearing at the Bar of the Court below when hidden by the Record, trenches upon principle, for a Court cannot judicially know the particular facts concerning an attorney practicing at its Bar.

23 C. J., 108, Sec. 1914.

If it could, and carry its investigation in this case beyond the Record before it, we would be shocked to discover that despite the actual facts, the Court below would attempt to maintain that the counsel involved was either honest or able, for the facts are, that the individual who was Robinson's attorney was the same attorney who procured the Delaware Incorporation, was the same attorney who represented the complainants in the receivership suit, and is the same attorney representing the Respondents in the present litigation, in all the Courts below. It is because of this multiple employment that we withhold agreement with the Court that the honesty and ability of the particular attorney is established and this doubt is engendered almost exclusively by the Sixth Cannon of Ethics of the American Bar Association and such authority as

Blair vs. The Railway Co., 20 Fed. 348 (1884).

High Receivers, Fourth Ed. Sec. 188, 216.

Therefore, with much pain and regret we submit that so far as the hypothesis of the character and ability of counsel concerned in this litigation may effect the result, the order appealed from is wrong and should be reversed.

5. Can posterior judicial action between strangers involving one of several legal issues be a judicial justification for anterior judicial action between different parties based upon the other legal issues?

(Specification of Error 1.)

The concluding portion of the opinion of the Court of Appeals now under examination reads as follows: "As the action of the Court below was embodied in the four word order 'The petition is denied' we refer to the opinion of the painstaking judge who in a similar unwarranted application of another creditor set forth the reasons why such a course would not be sanctioned." (R. 25.)

Since this quotation in no manner identifies what is referred to, we are left the hazard of conjecture. We are reasonably certain that what is intended to be referred to is an opinion by Kirkpatrick, D. J., filed in the Court below as of the same term and number as the present matter on the first day of April, 1931, upon the application of the South Atlantic Lumber Co., who filed its petition on March 19, 1931, and since reported in 55 Fed. 2nd 232. The Record in this case shows that the final order appealed from in the present instance was entered on March 12, 1931. Hence, it is obvious that the opinion referred to first appeared of record in this cause twenty days after the final order in the present case. How such an opinion can be thought, as regards the present petitioner, to effect him either upon the theory of *res adjudicata* or *stare decisis*, and is there any other, eludes us entirely. Perhaps the quotation had no such object at all but was designed to fill a gap in the action of the District Court concerning which

the petitioner has so earnestly complained as indicated by the argument made in *ante,* p. 35. This is true because the whole theory of *stare decisis* is based upon anterior and retrospective judicial action, and if proof is required of this, it may be found in the observation of Mr. Justice White writing in

Pollock vs. Farmers Loan & Trust Co., 157 U. S. 650 (1894)

where he says, "The conservation and orderly development of our institutions rests on our acceptance of *the results of the past* and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time and confusion and turmoil must ultimately result."

See too

15 C. J. 916, sec. 304.

Since, however, the South Atlantic opinion was filed twenty days after the entry of the final order herein, it is self-evident that it can not be *stare decisis* as regards this petitioner and failing of that attribute must be *wholly worthless as a justification for judicial action preceding it by twenty days.* Of course, equally preposterous would be the conception that this South Atlantic opinion could be *res adjudicata,* for it is fundamental upon that principle that there must be privity between the parties as well as chronological progressive sequence in events. Here no one will suggest that there is any privity between the South Atlantic Lumber Co. and Shapiro. They are and were separate distinct and wholly disconnected entities. Consequently, any action on the South Atlantic application so far as it bears upon Shapiro is a rimless zero. Beside this, we declare without the fear of contradiction that between the two applications there is but a single point of similarity in regard

to the theory upon which they are based. The South Atlantic opinion is exclusively based on the Pennsylvania Sales in Bulk Law; while the Shapiro application while including the Pennsylvania Sales in Bulk Law in addition thereto was based upon the Pennsylvania Uniform Fraudulent Conveyance Act, 13 Elizabeth, the Common Law, and the Seventh Amendment of the Federal Constitution, for which reason we are unable to appreciate how, with any approximation of accuracy, it can by any means be claimed that the cases of Shapiro and the South Atlantic Lumber Co. arising after it are in any respect similar. We therefore respectfully submit that so far as the South Atlantic Lumber Co. opinion is concerned, if that is meant to be referred to by the opinion of the Circuit of Appeals in this case so far as it is made to effect the opinion of the Court of Appeals, is a totally false foundation and makes necessary a reversal of the order appealed from here so far as it is based thereon.

Indeed in this connection it must be observed that the implications involved in the procedure indicated by the opinion of the Court of Appeals involves practical difficulties which will reduce the practice of law to near anarchy, for if the opinion is right in this connection, had six other creditors of Robinson subsequent to the attempt of Shapiro to challenge this fraud, on their own account made six individual attempts, and six distinct opinions been rendered thereon by as many distinct District Judges, to make the opinion of the Circuit Court in this case consistent, everything stated in the six subsequent opinions regardless of the period of time in which they should have been delivered, should be regarded by Shapiro as being justification for his anterior repulse. To merely state this proposition seriously, is to reject it.

But there yet remains in all what is said by the Circuit Court of Appeals in this connection the crowning fallacy and this is contained in the question:

6. Does the transaction disclosed upon the record violate the Pennsylvania Sales in Bulk Law?

(SPECIFICATION OF ERRORS 1, 2, 3, 4.)

It will be remembered that this question was reserved for present consideration as stated in argument *ante* p. 25. This was done because of another peculiarity present in the case abounding in peculiarities.

As this case appears reported in 55 Fed. 2nd 234, it concludes with this phrase, "McLean v. Miller Robinson Co. (D. C.), 55 Fed. (2nd) 232".

However, when the certified record printed in this case is examined (R. 25) such conclusion is wholly missing. As the Federal Reporter is a private enterprise no one concerned with this case can rightfully be charged with this extraneous addenda. It has, however, the unfortunate tendency to mislead a reader of the Federal Reporter and irresistibly makes it necessary and draws into this record by terms what theretofore existed merely by guessing and implication. Thus it becomes imperative to examine the opinion of Kirkpatrick, D. J., as reported in 55 Fed. 2nd 232, under the title of McLean v. Miller Robinson Co.

While the present petitioner in no manner was a party to proceedings in which that opinion was delivered nor concerned in its formulation, he unreservedly declares that opinion to be wholly unsound and insupportable.

The most direct and summary way to establish this is to cite and invoke the opinion in:

First National Bank v. Raleigh Savings Bank & Trust Co., 37 Fed. 2nd 301 (1930)

a case which we maintain is directly in point with the facts in the present record, for there the Circuit Court of Appeals for the Fourth Circuit held upon a transaction *in no material aspect distinguishable upon the facts from those crying out in the present instance, that the transaction violates the Sales in Bulk Law (of North Carolina in that instance, substantially identical with the Pennsylvania Statute)* and 13 Elizabeth, as well.

An examination of this last cited case unmistakably shows that it has anticipated and refuted every argument advanced by Kirkpatrick, D. J., thus in our judgment demonstrating all the errors in that opinion. In addition to what is so cogently stated by the Circuit Court of Appeals for the Fourth Circuit we submit that Kirkpatrick, D. J., errs in his opinion for these further reasons:

(a) The opinion overlooks or ignores that Robinson was co-complainant in the equity suit and that Robinson in the masquerade of the Delaware Corporation is likewise the sole defendant there, which quite independent of what has hereinbefore been argued, *ante*, p. 13, makes the whole proceedings therein described *a nullity for want of parties* because, as stated by this Court, "A man cannot sue himself."

Page v. Patton, 5 Peters 315 (1831)

for the same person cannot be plaintiff and defendant in the same suit

20 R. C. L. 663, Sec. 2

for basically,

> "A suit at law is a contest between two parties in a court of justice, the one seeking and the other withholding the thing in contest. The same individual cannot be at the same time both the party seeking and the person withholding, for it involves an absurdity

that a person should seek from himself or withhold from himself."

Monmouth Investment Co. v. Means, 151 Fed. 163-164 (1906).

Indeed, antagonistic disputants are essential to a truly judicial contest.

Pennsylvania College Cases, 13 Wall. 215 (1871).

(b) The opinion states, "There is no suggestion of actual fraud." This is clearly wrong. Legal fraud is actual and this is overwhelming present viewed from a variety of angles indepedent of the Sales in Bulk Law, *ante,* pp. 13-19.

(c) The opinion states, "The transaction did not reduce the value of the assets available to creditors but merely changed their form. Instead of the tangible property, the creditors could proceed against the stock which was indisputably of equal value." This is exceedingly naive and from the standpoint of the petitioner proves too much and if consistently adhered to, would, in the present situation, work a benefit to him. If the assets were still available to creditors, should Shapiro being one, lose his execution to reach the assets, which was denied him, but a change of form of the assets might be and generally is the most effective measure to place them beyond the reach of creditors. But the major fallacy is that stock of the Delaware Corporation is of equal value of Robinson's lumber and other tangible assets. When or where could this ever be true? In what market, stock or merchandise? When or where? And by what legal principal can the debtor select for the creditor the medium of payment against the latter's objection, in the absence of contract? We await a legal answer to these queries with some curiosity. All else in

the opinion is demolished by the argument of the Court in

First Nat. Bank v. Raleigh Savings Bank & Trust Co., supra.

For ourselves we do not overlook the presence of McLean as co-complainant with Robinson in the record of the receivership proceedings. (R. 2.) He stands alone, for all that has gone before has eliminated Robinson. The bill shows, however, that McLean is a simple contract creditor. (R. 3.) That being his status, regarding him as the sole party complainant for the moment, the lack of jurisdiction by the District Court to maintain the bill upon its face, is perfectly certain upon authority of

Pusey & Jones Co. v. Hanssen, 261 U. S. 491 (1923)

holding that a receivership in the Federal Court *is not available as a remedy for a simple contract creditor, even where the debtor is insolvent* (which this record expressly negatives) but that the creditor must exhaust his legal remedy.

It follows, therefore, that all that is said and omitted to be said by Kirkpatrick, D. J., *supra,* is erroneous with the sequel that so far as the order appealed from is founded on it, is necessarily erroneous for which reason, coupled with the manifold errors permeating all other elements in the record, make it certain that the order appealed from is wrong and should therefore be reversed.

Respectfully submitted,

JACOB WEINSTEIN,
Attorney for Bernard L. Shapiro, Petitioner.

September 20, 1932.

FILED
APR 26
CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 40 October Term, 1931.

BERNARD L. SHAPIRO,
Petitioner,

v.

HORACE B. WILGUS and DAVID BACHMAN,
Receivers of MILLER ROBINSON COMPANY,
Respondents.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 881. October Term, 1931.

BERNARD L. SHAPIRO,
Petitioner,

v.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of MILLER ROBINSON COMPANY,
Respondents.

ANSWER OF HORACE B. WILGUS AND DAVID BACHMAN, RECEIVERS OF MILLER ROBINSON COMPANY, RESPONDENTS, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Horace B. Wilgus and David Bachman, Receivers of Miller Robinson Company, in answer to the petition for a writ of certiorari herein, which has been filed in this Honorable Court, dated April 12, 1932, respectfully show:

1. They admit that Bernard L. Shapiro, the petitioner, held a note of Herbert P. Robinson for $1000.00, which

matured on December 9, 1930. They aver that on January 9, 1931, a charter was granted by the State of Delaware to a corporation known as Miller Robinson Company, the application for which was made by said Herbert P. Robinson and his two sons. They aver that up to and including said day the said Robinson had carried on as an individual a retail lumber business in the City of Phladelphia, State of Pennsylvania, under the trade name of Miller Robinson & Company. They aver that on January 9, 1931, the said Robinson assigned all the assets of said business, and only those assets, to the new corporation, and received therefor the entire capital stock of said corporation. In addition to issuing to Robinson its entire capital stock, the corporation specifically and by name, including the name of Shapiro, assumed and agreed to pay and be liable for all debts owing by Robinson in the business which he had theretofore conducted. They deny that on January 12, 1931, Robinson alone applied for an equitable receivership. They aver on the contrary that for the reasons set forth in the bill filed, one John N. McLean, a creditor, and said Robinson did on January 12, 1931, file a bill in the District Court of the United States for the Eastern District of Pennsylvania upon which your respondents were appointed receivers on January 13, 1931.

2. They admit that Shapiro, the petitioner, brought suit against Robinson individually on January 16, 1931, and thereafter obtained judgment in said suit by default on February 4, 1931.

3. They admit that on February 26, 1931, Shapiro filed his petition in the District Court of the United States for leave to issue execution on his said judgment and to levy the same against the property which had been placed in the possession of the receivers. They admit that said petition alleged fraud and collusion. They deny that the answer

admitted the facts set forth in the petition. They aver that the said answer admitted the formation of the corporation, admitted the transfer of the assets, admitted the obtaining of the judgment and the filing of the said petition by Shapiro but denied the averments of fraud and collusion and denied that the transaction was for the purpose or with the intent to hinder, delay or defraud the petitioner or any other creditor of said Herbert P. Robinson.

4. They admit that the District Court of the United States on March 12, 1931, after argument upon petition and answer, without any proofs submitted in support of the averments in the petition, denied the petition without filing an opinion, and they admit that the order denying the petition was affirmed by the Circuit Court of Appeals of the United States for the Third Circuit in an opinion filed on December 31, 1931, and that a petition for rehearing was denied by said Court on January 28, 1932.

5. They admit that the schedule of assets and liabilities attached to the Bill of Complaint praying for the appointment of receivers shows that the assets of the corporation exceeded the liabilities by about $100,000.00 and they admit that the Circuit Court of Appeals stated in its opinion that Robinson was solvent at the time of the conveyance and the application for the receivership, and they aver that said Robinson was as a matter of fact at said times solvent.

6. They deny that the Circuit Court of Appeals affirmed the order of the District Court of the United States on the ground that Robinson procured the incorporation of a Delaware Corporation for the purpose of obtaining a receiver therefor in order to prevent suits against him and the consequent destruction of his business.

As to the reasons relied on for allowance of the writ prayed for, your respondents

RESPECTFULLY REPRESENT:

1. The right of the petitioner to levy on the goods under a judgment obtained against Robinson was postponed by reason of the appointment of the receivers and the consequent passing of the possession of said property to the hands of the Court for the equal protection of all creditors and the conservation of the rights of stockholders of the corporation.

2. The decree of the District Court refusing permission to levy an execution upon the assets in its possession did not deprive the petitioner of any right vested in him to have the question of fraud under the circumstances of this case determined by a jury.

3. Respondents on information and belief reiterate the averment in their answer to the petition filed by Shapiro in the District Court and deny that the creation of the corporation and the application for a receivership conferred a colorable jurisdiction on the District Court of the United States for the Eastern District of Pennsylvania on the ground of diversity of citizenship and your respondents respectfully call the attention of this Honorable Court to the fact that there is no testimony supporting or tending to support the averments of the petition.

4. Respondents deny that the conveyance to the corporation by said Robinson of the assets of said business rendered him insolvent and deny that it was fraudulent at common law in Pennsylvania and under the Pennsylvania Fraudulent Conveyance Act. Respondents aver that the transfer was not made without consideration and on the contrary that even if the transfer was a "conveyance" in the common meaning and intent of this word, the transaction was on a full and adequate consideration in that the

corporation expressly agreed to indemnify Robinson against the debts owing by said business and in addition to issue to him capital stock having an admitted value of $100,000.00 and that the rights and remedies of the creditors as against said Robinson and against said assets remained undisturbed and unchanged.

5. Respondents admit that if no receivers had been appointed for the corporation's assets, the petitioner might have made an attempt as set forth in paragraph 5 of his petition but that no such right existed upon the due and legal appointment of receivers by a court having jurisdiction to make such appointment.

6. Respondents deny that the practical result of the decision in this case is as set forth in paragraph 6 of the petition and deny that the effect of said decision would be to permit a solvent debtor to transfer his assets to a corporation with the conceded intent of getting them out of the reach of his creditors. Respondents aver that nowhere in the record is it conceded that there was any such intent and nowhere in the record does it show that the transaction resulted in the assets being placed out of the reach of creditors.

7. Your respondents respectfully suggest that the averments of paragraph 7 of the petition are immaterial inasmuch as it is obvious that the Circuit Court of Appeals used the word "preference" in a sense other than the word implies under the provisions of the Bankruptcy Act. There was no reason for considering the effect of the Bankruptcy Act. Under the admitted circumstances there could be no "preference" in this case as defined by or which would come within the provisions of the Bankruptcy Act.

8. Your respondents deny the averments of paragraph 8.

9. Your respondents deny that the decision violates the constitutional right of the petitioner to a trial by jury or otherwise.

Wherefore, these respondents pray that the said petition for writ of certiorari may be dismissed with costs.

And your respondents will ever pray, &c.

Horace B. Wilgus
David Bachman
Respondents.

Philadelphia, April 25th, 1932.

State of Pennsylvania, }
County of Philadelphia, } ss.

HORACE B. WILGUS, being duly sworn according to law, deposes and says, I am one of the respondents named in the foregoing Answer and that I reside in the City of Philadelphia, State of Pennsylvania; I am one of the receivers of Miller Robinson Company. Each and every allegation in the foregoing Answer is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Horace B. Wilgus

Sworn to and subscribed before me this 25th day of April, A. D. 1932.

(Seal) Anna L. Draeger
NOTARY PUBLIC
My Commission Expires Nov. 16, 1935

State of Pennsylvania,
County of Philadelphia, } ss.

DAVID BACHMAN, being duly sworn according to law, deposes and says, I am one of the respondents named in the foregoing Answer and that I reside in the City of Philadelphia, State of Pennsylvania; and I am one of the receivers of Miller Robinson Company. Each and every allegation in the foregoing Answer is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

David Bachman

Sworn to and subscribed before me this 25th day of April, A. D. 1932.

(Seal)

Anna L Wrede
NOTARY PUBLIC
My Commission Expires Nov. 16, 1933

COUNTER-STATEMENT OF THE CASE.

The material facts disclosed by the record are as follows:

Herbert P. Robinson was the owner of a retail lumber yard and business in Philadelphia carried on under the trade name of Miller Robinson & Company. He was in the usual condition of possessing various assets in connection with the business, including real estate, equipment, lumber, book accounts, etc., and had incurred various liabilities and indebtedness. He was solvent to the extent of approximately $100,000.00. He decided to change his individual ownership of the business to corporate form, and on January 9, 1931, obtained a charter under the laws

of the State of Delaware under the name of Miller Robinson Company. He transferred to the corporation all the assets of his business, both real and personal. The transfer, as appears by the records of the corporation, was made by Robinson expressly subject to all his debts, and the corporation affirmatively assumed and agreed to pay all the debts, including specifically by name, among others, the indebtedness due petitioner.

The corporation was capitalized at $100,000.00. The expressed consideration to Robinson for the transfer of the assets was the assumption of the liabilities and the agreement to pay them and the issuance by the corporation to Robinson of its capital stock. The assets, according to the valuation and appraisement made at the time, exceeded by approximately $100,000.00 the liabilities of the business subject to which the transfer was made.

Thereafter the corporation, though amply solvent, became temporarily embarrassed owing to suits pending and threatened and its inability to meet its then presently accruing indebtedness, and on January 12, 1931, a creditors' and stockholders' Bill was filed in the District Court of the United States for the Eastern District of Pennsylvania. On this Bill the Court appointed the present respondents receivers to take possession of the assets and business of the corporation and to conduct the same in the interest of its creditors and stockholders.

In making the appointment, the Court issued an order restraining suits against the Receivers and interference with the possession of the assets in the hands of the Receivers. The respondents duly qualified as Receivers, entered into possession of the assets of the corporation and continued to conduct its business.

On January 16, 1931, petitioner brought a suit against Herbert P. Robinson individually in the Court of Common Pleas of Philadelphia County on a note given by

Robinson to petition and judgment in said suit was entered against Robinson on February 4, 1931.

Petitioner thereafter, on February 26, 1931, filed a petition in the receivership proceedings asking for a rule on the Receivers to show cause why he should not be permitted to issue an execution on his judgment in the State Court against Robinson and levy the same on the assets in the hands of the Receivers. The Receivers only were made parties respondent in that petition. An answer was filed setting forth the foregoing facts and denying the averments of conclusions of fraud and collusion and intent to hinder and delay creditors which were contained in the petition.

ARGUMENT.

The application in this matter is based upon the contention of the petitioner that he has been deprived of his constitutional right to a trial by jury.

Shapiro, the petitioner, filed a petition in the lower court in which he asked for leave to issue an execution on a judgment obtained by him in the courts of the State of Pennsylvania against Herbert P. Robinson in order that the execution might be levied upon the assets of a corporation known as Miller Robinson Company, which corporation and its assets were in the hands of receivers appointed by the District Court. The receivers had taken possession of the company and its assets before Shapiro instituted the suit in which he obtained the judgment. To this petition the receivers filed an answer.

Two questions are present:

I. Was the proceeding in which the controversy arose of a nature entitling the petitioner to a jury trial?

II. Was there any controversy which could be submitted to a jury?

I.

The constitutional right invoked by Shapiro is contained in the VII amendment which provides that:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This amendment did not nor was it intended to enlarge the rights of parties to trial by jury. It provided for the preservation of the right to a trial by jury. If no right existed, theretofore, none was conferred under the amendment. The direction to "preserve" the right to a jury trial does not apply to cases other than to suits at common law.

The Constitution of the State of Pennsylvania, Section 6, similarly provides:

> "Trial by jury shall be as heretofore and the right thereof remain inviolate."

This secures to litigants the right to a jury trial as it existed theretofore.

In *Byers v. Commonwealth,* 42 Pa. 94 (1862), the defendant was convicted in a summary proceeding of a statutory violation. He contended that the statute which provided for the summary proceeding was repugnant to the clause in the Declaration of Rights in the Constitution which guarantees that "trial by jury shall be as heretofore." The court held that the measure of this constitutional guarantee was to be sought in the usages which pre-

vailed at the time when it was asserted, and that in courts of equity and in many other classes of cases there never was a right to trial by jury.

In the instant case the application was made to a court of equity, in an equitable proceeding in which the court, to conserve the assets, appointed receivers. Shapiro's application was not directed to the status of the receivership, nor was it for the purpose of attacking or dissolving the receivership. It was a petition or appeal to the conscience of a Chancellor and permission to disregard the order of the court so that the petitioner might attempt to enforce a right which he claimed to have. In such cases the Chancellor decides questions of fact as well as law, and there is no violation of a constitutional guarantee.

The petitioner has been deprived of no rights. The receivership does not divest any lien he may have against the assets in the hands of the receivers. Its only effect is to postpone his right to enforce such lien. The court, appointing a receiver, has not only the power but is under a duty to protect from interference the property which it has taken into its possession and the exercise of such power is not a deprivation of due process of law. This is so, even though the right set up is claimed to be superior to the right of the receivers.

II.

There were no controversial facts to be submitted to a jury. The facts complained of by Shapiro, and on which he relied to induce the court to give him permission to take the independent action, are those set out in his petition. The District Court and the Circuit Court of Appeals held that the alleged facts did not constitute a fraud. If the averments in Shapiro's petition standing alone and untraversed might have constituted in the minds of the court a sufficient cause for permitting him to take the independent

action, the receivers filed a responsive answer to such allegations. The effect of this answer was to negative Shapiro's allegations. If he desired to substantiate and support his allegations by proof, in order to strengthen his appeal to the conscience of the Chancellor, the method of so doing is well established and the opportunity was open to him to take depositions. This petitioner did not at any time request or demand a trial by jury, irregular as such a demand might have been.

In the brief of the petitioner before this Court he admits that he was not asking the Court below to find fraud, but to permit him to go into another court to try to prove his allegations. To put it another way, the District Court and the Circuit Court of Appeals were asked to permit the petitioner to interfere with the orderly administration of the receivership without requiring him to prove at least *prima facie* his allegations, notwithstanding the fact that the allegations were met with a positive denial.

The District Court and the Circuit Court of Appeals decided the question on petition and answer, a proceeding in force long before the adoption of our Constitution and a proceeding well within the powers and jurisdiction of those courts.

CONCLUSION.

There was no error in the conclusions reached by the District Court and the Circuit Court of Appeals. The case was tried according to the customary and usual practice, and not in violation of the VII Constitutional Amendment guaranteeing trial by jury.

Respectfully submitted,

SIDNEY E. SMITH,
Attorney for Respondents.

FILE COPY

OCT 21 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1932. No. 40.

BERNARD L. SHAPIRO,
Petitioner,

v.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of MILLER ROBINSON COMPANY,
Respondents.

RESPONDENTS' BRIEF ON THE MERITS.

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IN THE

Supreme Court of the United States

October Term, 1932. No. 40.

BERNARD L. SHAPIRO,
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HORACE B. WILGUS and DAVID BACHMAN, Receivers of MILLER ROBINSON COMPANY,
Respondents.

RESPONDENTS' BRIEF ON THE MERITS.

BRIEF OF ARGUMENT.

ARGUMENT.

This brief on behalf of respondents is designed to discuss four questions—(A) one of them raised by the respondents as to the right of petitioner to maintain the proceedings as instituted by him; (B) the other three, the material and relevant ones raised by the petitioner in his brief, covered by petitioner's assignments of error, 1, 2, 3 and 4 (Petitioner's Brief pp. 8 to 25).

A.

THE PROCEDURE ADOPTED BY PETITIONER WAS IMPROPER.

The propriety of the procedure adopted by petitioner was questioned by the respondents both in the District Court and in the Circuit Court of Appeals. Presumably, both Courts felt it was not necessary to adjudicate the question.

Whether there is merit or otherwise in his charges, the petitioner is not entitled to attempt to raise the question in the manner here present. He has violated two elementary rules—(a) by a collateral and indirect attack on the receivership proceedings; and (b) by failure to join the necessary parties.

(a) The petitioner does not question the prima facie right of the District Court to appoint the receivers and to issue the injunction. He, possibly unconsciously, admits that the proceedings in and the decree of the United States Court as they were when he filed his petition are effective and binding upon him until such proceedings are set aside or such decree is modified or revoked. He admits that he does not desire an opportunity to attack directly the actions of the parties or the validity of the receivership, and expressly disclaims a desire to vacate or void the proceedings as a whole. His demand is that because his petition states conclusions that the actions of persons named therein were fraudulent—conclusions that he made no effort to support—he has the right to indirectly set aside and revoke the receivership proceedings and the effect thereof for his exclusive and sole benefit, and this by an action in a State court into which court he would compel the receivers to come to defend the jurisdiction and power of the United States Court and the effect of its decrees, and to defend the actions of the persons. This result he would accomplish by proceeding in a separate

and different action, which action would eventually lead to a jury trial.

The jurisdiction and the right of a court which appoints a receiver will be upheld by every legitimate inference. Wherever a court has jurisdiction of the subject matter and of the necessary parties, its action in appointing receivers, whether such action is erroneous or not, cannot be questioned in a collateral proceeding. Some scattered State court decisions contain an intimation that a collateral attack may be made if the transaction is fraudulent. An examination of these cases, such as Metcalf v. Moses, 161 N. Y. 587, and Schloss v. Schloss, 14 App. Div. 333 (N. Y.), shows that there were present and adjudicated in such cases bad faith, a bald and patent scheme to defraud creditors, false and fraudulent statements to the Court and/or suppression of material facts in obtaining the appointment—practically a fraud on the Court—and not merely unsupported allegations of such conditions and averments of conclusions from such allegations. Practically universal is the sounder, and, it is respectfully submitted, the only safe, rule, that if it is claimed that a receivership and the effect thereof are to be questioned, the proper and only proceeding open is to attack them directly where the parties whose actions are criticized may have the opportunity to meet the attack. The possibilities of any other rule are too obvious to need comment.

(b) The second rule violated is that which requires that every litigant have his day in court. If it be assumed, for the sake of argument, that in a proper form of proceeding petitioner had set forth sufficient to warrant his demand, he has failed in his duty. He bases his complaint upon the actions of Robinson and the action of Robinson and McLean. They are the ones who are charged as perpetrating the fraud. There is no charge that the receivers had any part in the transaction. The right to have the receivers appointed to conserve their

respective interests in the property was of value to Robinson and to McLean, without considering other creditors or parties. The petition was not directed against Robinson and McLean. It was directed against the receivers. The persons whose actions are the foundation upon which petitioner's demand was built were therefore not made parties to the proceedings and the record shows no effort to that end. The granting of the petition would conclude Robinson and McLean without any opportunity to be heard on any consideration of charges against them involving their good faith and without an opportunity to defend the validity and force of the protection which the Court had set up at their request on prima facie proper grounds.

B.

The petitioner in this case bases his claim on three grounds:

I. THE PETITIONER WAS ENTITLED TO HAVE A TRIAL BY JURY IN A STATE COURT OF THE ALLEGATION OF FRAUD IN HIS PETITION AND THE ORDERS OF THE LOWER COURTS UNCONSTITUTIONALLY DEPRIVED HIM OF SUCH RIGHT.

II. THE TRANSFER AND CONVEYANCE BY THE INDIVIDUAL, ROBINSON, TO THE CORPORATION, MILLER ROBINSON COMPANY, WAS FRAUDULENT.

III. THE FORMATION OF THE CORPORATION, MILLER ROBINSON COMPANY, UNDER THE LAWS OF THE STATE OF DELAWARE WAS IN ORDER TO CONFER A COLORABLE JURISDICTION UPON THE UNITED STATES DISTRICT COURT, AND SUCH FORMATION, THE TRANSFER OF THE ASSETS OF THE INDIVIDUAL ROBINSON TO THE CORPORATION, AND THE APPLICATION FOR THE

APPOINTMENT OF RECEIVERS WERE ELEMENTS OF A PLAN OF ROBINSON TO DELAY, HINDER AND DEFRAUD HIS CREDITORS.

It is conceived that the points above set forth are the only material and relevant subjects of discussion, and it is purposed to discuss these in the order above set forth.

I.

THE PETITIONER WAS NOT ENTITLED TO A JURY TRIAL IN THE STATE COURT.

The petitioner complains (Petitioner's Brief pp. 8, 13) that by the action of the Courts below he was unconstitutionally deprived of his right to trial by jury in the State court on the question whether or not there was an intent on Robinson's part to hinder, delay, and defraud creditors when he made the conveyance to the corporation, and this was followed by the application for the appointment of receivers.

This case is before the Court as a result of proceedings had on a petition filed by the petitioner in the lower court. To this petition there was a responsive answer filed by the respondents. No depositions or other form of testimony was submitted to the Court below.

The matter was argued on petition and answer.

Mr. Justice Field in Iowa v. Illinois, 147 U. S. 1, 7, says:

> "By setting down the case for hearing on the bill, answer and replication, (without taking any testimony) and on the cross bill and answer to it, all the facts alleged in the answer to the original bill, as well as those alleged in the cross bill and not denied in the answer, are thereby admitted."

See also Terral v. Burke Constr. Co., 257 U. S. 529, 531;
Campbell v. Northwestern Eckington Imp. Co., 229 U. S. 561.

The entire and complete fact situation, as set forth in the record, is as follows:

(a) Herbert P. Robinson, on and prior to January 9, 1931, was engaged individually in the retail lumber business under the name of Miller Robinson and Company. (R. 17).

(b) Prior to and on January 9, 1931, he was indebted, among others, to petitioner in the sum of $1000.00. (R. 11).

(c) On January 9, 1931, the business was solvent to the extent of $100,000.00, that being the value of assets of the business over and above its indebtedness. (Petitioner's Brief pp. 7, 30, 31 —R. p. 3).

(d) On January 9, 1931, a charter was obtained by Robinson, a citizen of the State of Pennsylvania, under the laws of the State of Delaware, for a corporation known as Miller Robinson Company with an authorized capital of $100,000.00. (R. pp. 12, 17).

(e) On January 9, 1931, Robinson by deeds and other writings conveyed and transferred all the assets of his business to the corporation Miller Robinson Company. (R. pp. 12, 17, 18).

(f) The expressed consideration for the transfer was the issuance to Robinson of $99,000.00 of the capital stock and the assumption by the corporation of all debts of the business and the agreement to pay the same. This assumption and agreement included specifically by name, among others, the petitioner and the amount due him. (R. pp. 3, 4, 7, 18).

(g) The purpose of Robinson in the formation of the corporation was to continue in corporate form the business in which he had been theretofore engaged as an individual. (R. pp. 17, 18).

(h) On January 12, 1931, Robinson and one John N. McLean, a creditor in the sum of $8000.00, filed in the District Court for the Eastern District of Pennsylvania their Bill setting forth, inter alia, that Miller Robinson was solvent; that because a suit had been brought against it, and others threatened, there was danger of dissipation of assets. They prayed the Court to appoint receivers for the corporation. (R. 2).

(i) With the Bill there was filed an Answer by Miller Robinson Company admitting the averments of the Bill and joining in the prayer. (R. 7).

(j) On January 12 and 13, 1931, the Court appointed respondents as receivers. (R. 8 to 11).

(k) The usual injunction order prohibiting suits and levies against Miller Robinson Company appears in the decree appointing the receivers. (R. 10).

(l) On January 16, 1931, the petitioner brought suit against Robinson individually on the above mentioned indebtedness and judgment was duly entered therein. (R. 11).

The petitioner sets forth and relies on the 7th Amendment to the Federal Constitution and Section 6 of Article I of the Constitution of the State of Pennsylvania.

The 7th Amendment is as follows:

> "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of

the United States than according to the rules of the common law."

The Constitution of the State of Pennsylvania, Article I, Section 6, provides:

> "Trial by jury shall be as heretofore, and the right thereof remain inviolate."

The petitioner does not seek a jury trial in the Federal Court. His demand is that without challenging directly the right of the Federal Court to hold possession of the assets of this corporation, he be permitted to compel the receivers to become party to proceedings in another court where the result might be serious damage to the property held by the receivers for the benefit of creditors. His proposed action is to be by way of a writ of fieri facias out of the State court (R. pp. 14, 15), under which the property in the hands of the receivers would be seized—this anticipating that the receivers would then be compelled to put in a property claim on which an issue could be framed on a sheriff's interpleader in the State court, thus resulting in a trial by jury in that court in the matter of the alleged fraudulent conveyance by Robinson.

It is respectfully submitted that the 7th Amendment to the Constitution of the United States has no bearing on the matter now before this Court.

It seems equally clear that Article 1, Section 6 of the Constitution of the State of Pennsylvania, relied on by the petitioner, does not apply.

The right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If the case belongs to this class the trial of the question belongs to the court itself no matter what may be its importance or complexity.

Barton v. Barbour, 104 U. S. 126, 133.

See also

Kohn v. McNulta, 147 U. S. 238, 240.

In the case of Minneapolis & St. Louis Railroad Co. v. Bombolis, 241 U. S. 211, 217, Mr. Chief Justice White said:

"the first ten Amendments, including of course the seventh, are not concerned with state action and deal only with Federal action."

The 7th Amendment to the Constitution of the United States applies only to courts sitting under the authority of the United States:

Pearson v. Yewdall, 95 U. S. 294, 296.

In Wabash Railroad Co. v. Adelbert College, etc., 208 U. S. 38, 54, Mr. Justice Moody said:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

In Edward Murphy, 2nd, v. John Hofman Co., 211 U. S. 562, 569, Mr. Justice Moody said:

"Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. *The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property.* In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdic-

tion of all other courts, although otherwise the controversy would be cognizable in them." (Italics ours.)

See also Field v. Kansas City Refining Co., 296 Fed. 800, 804, 805 (CCA 8th), Certiorari denied 266 U. S. 618.

The jurisdiction of the United States District Court could not be impaired by anything appearing in the Constitution or laws of the State of Pennsylvania. That Constitution does not require that the District Court shall surrender its possession of the property involved in this matter in order that the petitioner may have a jury trial as he demands.

In Hyde et al. v. Stone, 20 How. 170, 175, Mr. Justice Campbell said:

"• • • this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases, State laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

In Harrison v. St. L. & S. F. R. R., 232 U. S. 318, 328, Mr. Chief Justice White said:

"It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion or authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it."

This petitioner did not bring his suit in the state court until Januay 16, 1931 (R. 11), four days after the appointment of receivers in the case at Bar. (R. 8).

The demand of this petitioner has been passed upon by two courts and refused. The District Court, under Section 66 of the Judicial Code (28 USCA Section 125), and indeed, it is conceived, under its general equitable powers, undoubtedly had the authority to permit the petitioner to proceed as he demanded. The matter was one entirely within the discretion of the District Court and it is respectfully submitted that in no manner does it appear that the exercise of the discretion of the Court was erroneous or that such discretion was abused.

In Hayes v. Columbus etc. R. Co., 67 Fed. 630, it is stated that the Court should not permit the receiver to be made a party to proceedings in another court where the result may be a dismemberment of the property held for the benefit of creditors and lienors.

In Field v. Kansas City Refining Co. et al., 296 Fed. 800, 806, (CCA 8th), where property of a street railway was in the custody and control of receivers of a federal court, and it was held that the court below was right in refusing to permit an action to be brought in the state court concerning the right to property in the possession of the receivers, Judge Kenyon said:

"The discretion rested in the United States District Court to permit action to be brought in the state court or to prevent it and have the questions determined in the United States court. Unless this discretion in granting the injunction order against the defendant proceeding to final determination in the state court was improvidently exercised, this court will not interfere."

Certiorari denied, 266 U. S. 618.

The petitioner did not ask that the receivership be dissolved so that the assets would be subject to his levy. His demand is that because he has averred a fraudulent transaction the Court should surrender possession of the property which is in its charge for the benefit of all creditors and permit him to compel the officers of the Court to appear in a State court and defend the action of the Court of appointment. The language of Judge Kenyon in Field v. Kansas City Refining Co., 296 Fed. 800, 805, above cited, is particularly applicable to this attitude. Judge Kenyon says:

> "If the contention of appellant is sound, then the Federal Court is powerless to protect the property in the hands of the receiver, and the very purpose of the receivership to conserve and preserve the property for the benefit of all the creditors is destroyed."

In addition to the absence of right as above set forth, it is submitted that there is no controversy and no issue of fact to present to a jury. The entire fact situation is established and there is no controversy as to it. If the property had been converted into cash, or if it had been conveyed to the corporation without its assumption of the liabilities of the individual, or if it had been placed under the control of others, or if there had been a denial in the

answer of any of the facts alleged in the petition, or if the object of Robinson was not apparent from his actions, an issue of fact might result because it might be considered that such actions were equally consistent with an intent to do right and with an intent to do wrong. Here the actions speak for themselves and leave no room for doubt or speculation. The property which he conveyed was not concealed, was not removed, and remained subject in all respects to the same liability as to which it was subject immediately before the transfer. Instead of an action the result of which might have been to remove the assets or some part of them from the reach of creditors, Robinson's action was the reverse. Having completed the formation of the corporation, upon the appearance of danger to the interests of the creditors of the corporation (who were also his creditors) he co-operated in placing all of the property which had been transferred to the corporation in the hands of the Court so that it should be kept intact for the benefit of all parties interested therein—the reverse of a situation from which there might be drawn from either action an inference of a fraudulent intent or effort.

The province of a jury is to find facts and if necessary to draw inferences having the effect of facts. The conclusion to be reached as to the legal effect of such facts is for the court alone. Where there is no question as to the facts of the transfer fraudulent intent is not a question for the jury and should not be submitted to it. The District Court and the Circuit Court of Appeals each concluded there was no fraud.

In Covanhovan v. Hart, 21 Pa. 495, 501, where it was held that a conveyance of land by a debtor, who was in failing circumstances, to a creditor to pay an existing debt was not fraudulent, although the parties contemplated that thereby the claims of other creditors would be defeated, Mr. Chief Justice Black said:

"The judge said in his charge that little room is left to attribute fraudulent motives, when a debt is actually due from the vendor nearly equal to the value of the property. He should have said there is no room at all. *A human tribunal can take no cognizance of feelings and intentions which are not manifested by external conduct.* We are not permitted to assign a bad motive to an act which is not wrong either in itself or in its necessary consequences. . . . The act being right, no secret feeling can change its character. Indeed it may be said that the motive which results in proper action cannot be a bad one."

In The York County Bank v. Carter, 38 Pa. 446, 454, a somewhat similar case, Mr. Justice Strong said:

"A jury is not at liberty to deduce fraud from that which the law pronounces honest."

Werner v. Zierfuss, 162 Pa. 360, 365, 366;
Shibler v. Hartley, 201 Pa. 286, 287, 288.

See also

Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518.

The Pennsylvania cases cited by the petitioner (Petitioner's Brief, pp. 21, 22, 23) do not support his contentions.

In Zerbe v. Miller, 16 Pa. 488, the conveyance was by a father to his son, and intended to delay and hinder creditors and prevent them from taking the property in payment of their debts.

In Hennon v. McClane, 88 Pa. 219, there was involved a conveyance of land in consideration of future maintenance.

In Montgomery Web Co. v. Dienelt, 133 Pa. 585, there was a transfer by one corporation to another of all its property, except a small amount to satisfy a landlord's claim, and the new company assumed all the debts, except one, of the old company, the rest of the creditors assenting to the transaction. In this case, the conveyance was held to be fraudulent as to the excluded creditor.

In Delphia Knitting Mills Company, Inc. v. Richards, 62 Pa. Superior Ct. 9, an individual engaged in business transferred all his assets to a corporation organized by him, caused the stock to be issued to his wife, and thereafter continued in absolute control of the business and assets transferred.

In Atlas Portland Cement Co. v. American Brick & Clay Co., et al., 280 Pa. 449, it was held that when individuals or corporations transfer their property to a new corporation, substantially owned and controlled by the transferers, the new corporation takes the property subject to the rights of persons who have claims against the transferers.

In all of these cases the acts of the transferers were questionable as to the object and purposes sought to be accomplished. On their surface they appeared to be attempts to defeat the claims of creditors, and the manner and form of the transfer were such as could have resulted in a defrauding of the creditors or some of them. It was necessary, therefore, in those cases that evidence be submitted to ascertain the actual intent. In this case no such conditions exists.

II.

THE TRANSFER AND CONVEYANCE BY ROBINSON TO THE CORPORATION, MILLER ROBINSON COMPANY WAS NOT FRAUDULENT.

It is not clear from the petitioner's brief whether he now charges actual fraudulent intent, or merely fraud in

law. The petitioner's brief in some parts contains language which could be read to include the former. On page 19, however, he says:

> ". . . So far as we understand the statement we believe the Court intended to imply that the petitioner attempted to prove no fraud in fact. If so, that is quite correct."

If petitioner now asserts actual fraudulent intention or act, it is respectfully submitted that the record shows just the reverse.

The transaction under consideration is perfectly clear and discloses no element of fraud on creditors or anyone else. It does disclose a condition and a transaction very prevalent and of which innumerable examples could be cited—the action of a man who has concluded to change the form in which he has been conducting a business so that instead of carrying on as an individual, he will carry it on in corporate form.

Robinson, solvent, with no suits pending or judgments entered against him, was complete master of the business and the property thereof. There could be no limitation on his right to form a corporation and to form it under the laws of such State as he chose.

In Buchanan v. Warley, 245 U. S. 60, 74, Mr. Justice Day said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land."

Possessed of this right, and under such conditions, Robinson formed his corporation. He transferred to it all the assets of the business. None went to the control of or became subject to the claims of other persons than those who were creditors. He maintained complete control of the assets. To protect his creditors he caused the corporation to issue to him all its capital stock, representing the value of the assets of the business in excess of its liabilities, and also caused the corporation to expressly assume and agree to pay all debts. There can be no question that the debt due to this petitioner was expressly assumed because he is specifically named as one of the creditors to be paid by the corporation. The statement that all the capital stock was issued to Robinson is made because it is assumed that this Court will, as did undoubtedly the Courts below, realize that one thousand dollars of stock was issued in the name of others in order to qualify them as directors.

There is nothing in the record upon which to base the thought that by these actions Robinson endeavored or had any reason to endeavor to hide his assets from his creditors and there is nothing in his actions to indicate any desire to defraud his creditors. Every action indicates his purpose to protect his creditors and conserve his assets to meet his obligations. He made no effort to relieve himself of his personal liability. There was no attempt to substitute the corporation for himself as the debtor. Nothing was done which deprived, or which was intended to deprive, this petitioner or any other creditor of the security afforded by the assets of Robinson as they existed immediately before the formation of the corporation. In the face of the assumption by the corporation of the liabilities the petitioner could not predicate his claim of fraud on the proposition that the property was placed by Robinson beyond the reach of his creditors.

The petitioner presumably bases his claim of legal fraud on the Uniform Fraudulent Conveyance Act of the State of Pennsylvania of May 21st, 1921, (No. 379, P. L. 1045, 1046, 1047; 39 PS Sections 352, 354, 355) and the English statute, 13 Elizabeth (Petitioner's Brief, pp. 20, 21). The pertinent portions of the Pennsylvania Act are Sections 2, 4 and 5.

Section 2 of the Act reads, in part, (P. L. 1046; 39 PS Section 352):

> "A person is insolvent when the present, fair, salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and mature."

Section 4 reads (P. L. 1046; 39 PS Section 354):

> "Every conveyance made and every obligation incurred by a person *who is or will be thereby rendered insolvent,* is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or obligation is incurred without a fair consideration." (Italics ours).

Section 5 (P. L. 1047; 39 PS Section 355) reads:

> "Every conveyance made without fair consideration, *when the person making it is engaged, or is about to engage, in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital,* is fraudulent as to creditors, and as to other persons who become creditors during the continuance of such business or transaction, without regard to actual intent." (Italics ours).

The meaning of a word must be strained to assume that the formation of the corporation under the facts of

this case and the transfer to it of the assets was a "conveyance" as that word is used in the quoted sections of the Uniform Fraudulent Conveyance Act. If, however, it be assumed that the legislature intended that the changing by one of his method of doing business should be considered a "conveyance", in no way does this transaction measure up to the other requirements of the Act.

It is not asserted by petitioner that Robinson was made insolvent by the transfer to the corporation. On the contrary, he concedes that Robinson was solvent after the transfer by the sum of $100,000.00 (Petitioner's Brief pp. 7, 31). The record shows this condition (R. 3).

It may be of interest to note in connection with this phase of the matter that nowhere is it alleged that any fictitious value had been placed upon the assets which Robinson transferred to the corporation. It therefore appears that he received two valuable considerations for this "conveyance"; that is to say, he received (if a strict construction of the situation be had) capital stock of the corporation, which stock it is admitted represented the value of the assets transferred, in the amount of $99,000.00, over and above the liabilities and indebtedness of the business. In addition to the foregoing, he received the agreement of the corporation to assume liability for and to pay every debt which Robinson owed in connection with the business and which assumption would, of course, amount to an agreement to indemnify. There is nothing on the record to show whether Robinson had other assets; it might be assumed that he had no other assets but he would have and did have a worth of $100,000.00 and the agreement of the corporation (which by reason of its possession of the assets had ample property to perform its undertaking) to indemnify him again all his debts. There is likewise nothing in the record to show that Robinson had any debts other than those assumed by the corporation. This assumption of liability and the agreement to pay the debts was an asset of value.

Contract rights are property:

Omnia Commercial Company, Inc. v. U. S., 261 U. S. 502, 508.

Robinson, therefore, was not rendered insolvent by the "conveyance" and received full consideration.

Nor does this transaction come within Section 5. Robinson did not engage or evidence any intent to engage in any business or transaction other than the business in which he had theretofore been engaged. He maintained complete and sole control of the business. It is admitted (R. 17, 18) that his very purpose was to continue the business which he had theretofore carried on as an individual with exactly the same assets. There is nothing to show any intent otherwise. It is deemed not improper at this point to suggest to this Court that the Circuit Court of Appeals in its opinion states that with the exception of two creditors, practically all the creditors were satisfied with the course Robinson took (R. 24).

The application for the apopintment of a receiver for the corporation is not evidence of an intent to defeat the claims of Robinson's creditors or to hinder and delay them fraudulently. It could not have such an effect. It is true that Robinson as a stockholder was one of the plaintiffs. The other plaintiff was a creditor for an amount eight times that of the petitioner and one who occupied exactly the same position as petitioner and had the same rights as petitioner. The averment in the application for the appointment of receivers is that a suit had been brought against the corporation and others were threatened, and the consequent danger of dissipation of the assets because of the inability of the corporation to meet its maturing obligations. The inferences contained in the petitioner's statement of the case are not supported by the record.

Whatever was the reason, the effect of the appointment of the receivers was to make it impossible for Robinson or anyone alse to remove the assets from the reach of creditors. All of the property, subject as it was to liability for all the debts of Robinson, was thereby placed in the hands of the Court which held it for the benefit of all parties interested therein and as their rights then existed.

The receivers were merely stakeholders:

Shields v. Coleman, 157 U. S. 168;
Bosworth v. St. Louis Term. R. Assn., 174 U. S. 182.

In Riehle v. Margolies, 279 U. S. 218, 223, Mr. Justice Brandies said:

"The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection, and distribution of the assets."

In Clark Bros. & Co., Inc. v. Pou, 20 F. (2d) 74, 78 (CCA 4th), Judge Northcott said:

"It must be remembered that the receivers, while standing in the place of the Co-operative Association, have an additional duty as officers of the court, and that upon them rests the burden of standing impartially between all parties concerned, with the further obligation, in so far as they possibly can, to protect the rights of all parties. 'It is as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities as it is to make a just dis-

tribution among the general creditors.' 23 R. C. L. under title 'Receivers,' §118, and cases there cited."

The petitioner at the time of this action had no lien or claim against the specific property. Even if there had been a fraudulent transfer in fact, the petitioner would have been compelled to institute an action in order to acquire a lien against the fund. To say that under the circumstances this petitioner is entitled to the demand he makes would be to controvert the thoroughly grounded rule that one of the purposes of a receivership is the restraining of indiscriminate levies and executions in order that the property involved may be preserved from dissipation and waste and equal distribution be made to those entitled thereto.

It is respectfully submitted that there can be no construction of Robinson's acts up to the point of and including the formation of the corporation and the transfer of its assets as indicating an intent to defraud or as having the legal effect to that extent. The receivership in this case was not on Robinson's application alone and if there is any fraud to be assumed by reason thereof it must be held that a creditor in a sum eight times as much as that of the petitioner joined in that fraud. The petitioner has drawn and has referred to inferences as to the reasons for the application for the receivership. If we eliminate the inferences which the petitioner has referred to and has drawn, there is nothing in the record which shows with any clearness the reasons for the application for the receivership. If it be assumed, however, that upon the formation of the corporation the bringing of suit by a creditor and the contemplation of other suits, with the accompanying fear of dissipation and loss of and depreciation in the value of the assets, a situation was created which made it seem desirable or advisable to the greater body of creditors and to Robinson to ask for the appointment of a

receiver, such action cannot be considered a fraudulently collusive one rendering the proceedings for and the appointment of a receiver fraudulent.

It is settled law in Pennsylvania that a transaction which has for its object the payment of all creditors, and which places them on an equal footing is not fraudulent.

In Wilt v. Franklin, 1 Binn. (Pa.) 502, 513, 515, there was a conveyance of a debtor's assets to a trustee for the purpose of putting his creditors on an equal footing. The transaction was sustained against a judgment creditor who claimed it was fraudulent under the statute 13 Elizabeth. In this case Mr. Chief Justice Tilghman said:

> "The manifest intent of *Keely* was to prevent *Wilt* from obtaining any preference by his judgment, and to put all his creditors, without exception, on an equal footing. There appears to be nothing immoral or unfair in such intent. On the contrary, it is the object of well regulated societies, where commerce flourishes, to obtain an equal division of the property of insolvent traders. The statute of 13 *Eliz.* c. 5. (the provisions of which go no further than the common law as *now* understood) never had it in contemplation to invalidate a *fair* transaction. It was made to avoid fraudulent conveyances, intended for the purpose of defeating, hindering, or delaying creditors of their just debts. . . . It may be objected, that this case comes within the words of the statute, because *Wilt* has been *hindered, delayed,* and in part *defeated,* by this deed. It is true he has been delayed and partly defeated, but not in a fraudulent manner. We must give the statute a reasonable construction. *Wilt* would have been delayed and partly defeated, if, immediately after the commencement of his suit, *Keely* had, with the consent of all his other creditors, executed a deed to trustees of the creditors' own choice,

for the purpose of disposing of his estate, and dividing the proceeds equally among them. But I imagine no one would contend that in such case the conveyance was not good." (Part of italics ours).

Lippincott v. Barker, 2 Binn. 174, 183, 184;
M'Allister v. Marshall, 6 Binn. 338, 347;
M'Clurg v. Lecky, 3 P. & W. 83, 91;
The York County Bank v. Carter, 38 Pa. 446, 453;
Bentz v. Rockey, 69 Pa. 71, 76, 77;
Lake Shore Banking Co. v. Fuller, 110 Pa. 156, 162, 163;
Werner v. Zierfuss, 162 Pa. 360, 365, 366;
Miller v. Shriver, 197 Pa. 191, 195;
Shibler v. Hartley, 201 Pa. 286, 287, 288;
Love v. Clayton et al., 287 Pa. 205, 215.

While the element does not exist in the case at Bar some of the cases cited above go to the extent of holding that the transaction is valid notwithstanding that particular creditors are preferred thereunder.

Thus, in The York County Bank v. Carter, 38 Pa. 446, 453, supra, partners being heavily indebted, transferred their entire property to another party in consideration of the satisfaction of his claim against them and his assumption to pay the balance of purchase money in discharge of partnership debts due certain other specified creditors. It was held that the transaction was not void because certain creditors were preferred if there was no intent to delay, hinder or defraud the others. Mr. Justice Strong said:

"'The statute of 13 Eliz. is aimed only at intended fraud. But the payment of a debt to one creditor is no fraud upon another creditor, no legal injury to him. It was remarked by Chief Justice Gibson, in Gans v. Renshaw, 2 Barr. 36, that "though an insolvent

debtor may give such preferences to particular creditors as he may see proper, yet if the motive be not payment of his debts, but, in the language of the statute, to 'delay, hinder, or defraud' particular creditors, it is not *bona fide*, and therefore not saved by the proviso." This, however, does not militate at all against the well settled doctrine that a debtor may prefer one creditor to another intentionally, and if his honest purpose be to pay a debt, the preference is not fraudulent, either in law or in fact. Other creditors may be delayed and hindered, but 'not in a fraudulent manner,' as was said by Tilghman, C. J., in Wilt v. Franklin, 1 Binn. 514."

In Love v. Clayton, et al., 287 Pa. 205, 215, it was held that a transfer of business property, contemplating a continuance of the business, is valid, although the transfer consists of several instruments, if the instruments, when read together, are seen to constitute one transaction, indicating an intention to assign the property for the benefit of creditors, Mr. Justice Kephart said:

"While a preference to creditors may be sustained under given conditions, even where it prevents other creditors from obtaining payment of their claims, if there be an honest intent to pay the preferred debt (The York County Bank v. Carter, 38 Pa. 446; Miller v. Shriver, 197 Pa. 191, 195; Lake Shore Banking Co. v. Fuller, supra, 163), courts will seize any opportunity to strike down such a transaction where fraud is intended, as a violation of the statute. There must be an intent to delay, hinder and defraud creditors. In the present case, take the entire series of transactions. *It was not a transfer to pay those who signed, but it set up a scheme whereby 'all' creditors would be paid.*" (Italics ours.)

III.

THE FORMATION OF THE CORPORATION, MILLER ROBINSON COMPANY, DID NOT OPERATE TO CONFER A COLORABLE JURISDICTION UPON THE DISTRICT COURT OF THE UNITED STATES.

Section 37 of the Judicial Code (28 USCA Section 80) provides:

> "If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The facts in the case at Bar do not bring it within the scope of the foregoing language.

In Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 524, 525, a suit was brought by the respondent, a Tennessee corporation, against the petitioner, a Kentucky corporation, to prevent interference with the carrying out of a contract by the respondent for a certain railroad. The respondent was organized by the shareholders of a Kentucky corporation having a similar contract with the railroad. The business and property of the Kentucky corporation were transferred to respondent and the former dissolved. The respondent's incorporators and the railway representa-

tives, preferred to have the controversy determined in the courts of the United States and therefore arranged to have the respondent organized in Tennessee to succeed to the business of the Kentucky corporation and to enter into the contract in suit in order to create a diversity of citizenship. It was held that there was no fraud upon the jurisdiction of the District Court under Section 37 of the Judicial Code. Mr. Justice Butler said:

"The requisite diversity of citizenship exists. And the controversy is real and substantial. The privilege granted is valuable. Petitioner treats the contract as invalid and claims to be entitled, without the consent of the railroad company to use railroad property to park its vehicles and solicit business. The railroad company has failed to protect the rights if granted. The motives which induced the creation of respondent to become a successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction. McDonald v. Smalley et al., 1 Pet. 620, 624. It is enough that respondent is the real party in interest. Smith et al. v. Kernochen, 7 How. 198, 216. The incorporation of the respondent or its title to the business and contract in question is not impeached. Coöperation between it and the railroad company to have the rights of the parties determined by a federal court was not improper or collusive within the meaning of §37. Re Metropolitan Railway Receivership, 208 U. S. 90, 110. Harkin v. Brundage, 276 U. S. 36. South Dakota v. North Carolina, 192 U. S. 286, 311. It requires no discussion to distinguish Lehigh Mining and Mfg. Co. v. Kelly, 160 U. S. 327, and Miller &

Lux v. East Side Canal Co., 211 & S. 293. The District Court had jurisdiction."

In Re Metropolitan Railway Receivership, 208 U. S. 90, 110, 111, it was held that a bill for a receiver should not be dismissed as collusive, because the defendant corporation admitted all the facts averred and joined in the prayer for a receiver, and it appeared that the bill was filed in the Federal Court because the parties to the suit desired the administration of the corporation's affairs should be in the hands of that court. Mr. Justice Peckham said:

> "It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts, named in the bill as owing to the complainants, did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal court. That the parties preferred to take the subject matter of the litigation unto the Federal courts, instead of proceeding in one of the courts of the State, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant."

The cases cited in petitioner's brief on page 14, (Miller and Lux v. East Side Canal Co., Southern Realty

Company v. Walker, and Lehigh Mining Company v. Kelly) are not applicable to the present case.

Miller and Lux v. East Side Canal Co. did not involve a receivership but was a suit between individuals. In that case a suit had been commenced in the California State courts by a California corporation. The stockholders or officers of the corporation concluded that it was advisable to have the suit in a Federal court. They thereupon formed a Nevada corporation and the assets of the California corporation were transferred. The only purpose of this was to create an ostensible diversity of citizenship. The suit in the State court was then discontinued and a suit on exactly the same grounds was instituted by the Nevada corporation in the United States Court. The California corporation continued in existence. This Court held that the transaction was merely a device to obtain the federal jurisdiction desired by the California corporation; that the Nevada corporation was not the real party in interest; that its ownership was a sham because the ownership of all its stock by the California corporation gave the latter full power to control the litigation, to cause its withdrawal or prosecution; that the real party was the California corporation because it had at any time the power to compel a reconveyance of the assets.

Lehigh Mining and Mfg. Co. v. Kelly was a suit between individuals. The plaintiffs' grantor remained in existence and in full control of the suit. The action of the Court was because of its conclusion that the plaintiff corporation was formed solely for the purpose of securing federal jurisdiction with the full intent of the parties to reconvey the property when the litigation was over and their purpose served.

In Southern Realty Company v. Walker, the facts clearly show that the plaintiff corporation was formed by two citizens of Georgia for the purpose of holding title to lands owned by those citizens and in order to obtain fed-

eral jurisdiction in litigation concerning the lands which it was desired to institute against other citizens of Georgia. In this case also it appeared that complete control of the corporation was continued by the real parties in interest.

In all of these cases there was an actual fraud on the Court. In none of them was the nominal plaintiff the real party in interest. In all, control of the actions, direction and control of the litigation and the property involved remained in the hidden parties. In the case at Bar, both parties plaintiff had a real and substantial interest and were acting to protect their respective separate interests. Nothing appears to show or justify the contention that the formation of the corporation was for the purpose of obtaining a receivership. The reverse is demonstrated by the admitted fact that Robinson originally formed the corporation for the purpose of continuing in corporate form the business in which he had been engaged. By the action of Robinson and McLean all control of the proceedings and of the property involved passed irrevocably from Robinson and from McLean. One of the powers of the Courts which they invoked made it impossible for Robinson to exercise rights which might have been in him by reason of his holding of stock. McLean's action amounted to a voluntary surrender on his part of his right to proceed against the defendant corporation for the collection of his admitted indebtedness.

In the case at Bar the parties are the actual parties in interest and the subject matter presented in the application for the appointment of the receivers was real and substantial. It needs no discussion to demonstrate that the privilege granted is valuable and it is respectfully submitted that the case in all material respects is identical with the Black & White Taxicab Case, supra.

The objection that the complainant McLean was improperly joined as a party complainant for the reason that he is a simple contract creditor is without foundation. It is true that in The Pusey & Jones Co. v. Hanssen, 261

U. S. 491, it was held that under the facts in that case receivers should not have been appointed but this was because the corporation objected and denied that the complainant was a creditor and that the company was insolvent. Justice Brandeis held that the objection did not go to the jurisdiction of the court, and could be waived. He says at page 500:

> "The case at bar is also unlike Re Metropolitan Railway Receivership, 208 U. S. 90, 109, 110, and many others, in which there was express consent by the corporation to the appointment of the receiver, or where the indebtedness to the plaintiff and the corporation's insolvency were admitted, or the lack of jurisdiction in equity was waived. The objection that the bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a federal court. . . . And where the defendant has expressly consented to action by the court or has failed to object seasonably, the objection will be treated as waived."

The record shows that McLean and Robinson were citizens of the State of Pennsylvania; that the defendant is a Delaware corporation; that McLean is a creditor to the extent of $8000.00; that Robinson is the holder of capital stock of the corporation. The defendant company by its Answer (R. 7) admitted the averments and joined in the prayer for the appointment of a receiver.

The order of the Court below was fully justified and its action in entering the order dismissing the petition filed therein was proper and should be affirmed.

Respectfully submitted,

SIDNEY E. SMITH,
Attorney for Horace B. Wilgus and David Bachman, Respondents.

October 19, 1932.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1932. No. 40.

BERNARD L. SHAPIRO,
Petitioner,

vs.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of MILLER ROBINSON COMPANY,
Respondents.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the above named Horace B. Wilgus and David Bachman, Receivers of Miller Robinson Company, and present this, their petition for a rehearing in the above entitled cause, and, in support thereof, respectfully show:

1. That this Court in its opinion herein erroneously found, from the record and the statements of counsel, that Herbert P. Robinson was unable to pay his debts as they matured, but believed he would be able to pay them in full if his creditors were lenient, and looked for a surplus of

$100,000, if the business went on under the fostering care of a receiver; that, pressed by creditors, he cast about for a device whereby his business might go on and the importunate be held at bay; that he had to reckon with obstructions erected by a local law, which does not permit the appointment of a receiver for a business conducted by an individual; and that his act responded to the need, when he incorporated his business. On the contrary, the record shows that the purpose of Robinson in the formation of the corporation was to continue in corporate form the business in which he had been theretofore engaged as an individual (R. pp. 17, 18). No statement by counsel at the bar of this Court, or elsewhere, was intended to convey the impression that the said Herbert P. Robinson incorporated his business for the purpose attributed to him by this Court, and the existence of such a purpose is not a fact appearing in the record, nor is it an actual fact.

2. That this Court in its opinion herein erroneously declared that "The conveyance and the receivership are fraudulent in law as against non-assenting creditors. They have the unity of a common plan, each stage of the transaction drawing color and significance from the quality of the other; but, for convenience, they will be considered in order of time as if they stood apart. The sole purpose of the conveyance was to divest the debtor of his title and put it in such form and place that levies would be averted. The petition to issue execution and the answer by the receivers leave the purpose hardly doubtful. Whatever fragment of doubt might otherwise be left is dispelled by the admissions of counsel on the argument before us."

The petition to issue execution was the pleading of a hostile party. The answer of the receivers averred that the corporation was formed to continue in corporate form the business in which Robinson had theretofore engaged as an individual.

The conveyance was identical in substance with the transfer in Love v. Clayton, et al., 287 Pa. 205, 215, decided after the enactment of the Uniform Fraudulent Conveyance Act in Pennsylvania, and sustaining the validity of a transfer of business property, contemplating a continuance of the business, and setting up a scheme whereby all creditors would be paid. In the federal courts the construction placed upon the local statute by the highest court of the state is controlling: Sumner et als. v. Hicks et als., 2 Black 532, 533, 534; Peter v. Bain, 133 U. S. 670, 686.

The formation of the corporation and the conveyance to it occurred on the same day (R. pp. 12, 17, 18), but the application for a receiver was not made until three days later, (R. p. 2) and this makes against a finding that the conveyance and the receivership had the unity of a common plan.

By the record, it appears that the corporation was formed to receive a transfer of the property and to continue the business; that this became impossible because a suit thereafter was commenced against it and others were threatened; and that the receivership resulted from these circumstances. Robinson, as an individual, could have obtained a result in the Federal Court under the Bankrupcty Act, which would have been less favorable to his creditors, including the petitioner herein. He could have filed a voluntary petition in bankruptcy, although solvent, (11 USCA, § 22, clause a); the bankruptcy court could have authorized his business to be conducted for a limited period by a receiver, (11 USCA, § 11, clause 5); and his discharge in bankruptcy would have absolved him from further liability to his creditors (11 USCA, § 35). In the receivership proceeding under the general equity jurisdiction in this case, if sufficient funds were not realized to pay the creditors in full, Robinson would still be liable to them for the deficiency. He did not seek to escape from his creditors, and his joining in a bill in equity for a re-

ceiver should not be adjudged part of a fraudulent scheme to hinder, delay, or defraud his creditors, when he could have put them in a much less favorable position by filing a voluntary petition in bankruptcy under the Act of Congress.

3. That this Court in its opinion herein erroneously found that the end and aim of the receivership in this case was not to administer the assets of a corporation legitimately conceived for a normal business purpose and functioning or designed to function according to normal business methods, but that what was in view was very different, to wit, a corporation formed three days before the suit for the very purpose of being sued was to be interposed between its author and the creditors pursuing him, with a restraining order of the court to give check to the pursuers. That this Court in its opinion herein erroneously found that, while it is proper for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large, such was not the case here, because it is another thing for a debtor, co-operating with friendly creditors, to bring the corporation into being with the hindrance and delay of suitors the very aim of its existence. This Court in its opinion herein erroneously found that the conveyance to the corporation was part and parcel of a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design.

The Court found that the suit really and substantially involved a dispute or controversy properly within the jurisdiction of the district court; that the corporation was not improperly or collusively made for the purpose of creating a case cognizable by the district court; and that dismissal of the suit was not required under Section 37 of the Judicial Code, (28 USCA, § 80). The transfer of the property

to the corporation was actual, the debts chargeable against the property were real, and the motives which induced the creation of the corporation and the transfer of the property to it have no influence on the validity of the transactions which are the subject of the suit: Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 524, 525.

There is no suggestion in the record that the complainant, McLean, had anything to do with the creation of the corporation or the transfer of the property to it. The district court had jurisdiction of his cause of action (The Pusey & Jones Co. v. Hannsen, 261 U. S. 491, 500), and it was proper for him, with a claim against the corporation that was legitimately his debtor, to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large. The determination of this Court in this case not only jeopardizes the position of McLean, but enables one creditor to secure a preference over all of the other creditors, after the jurisdiction of the court attached for the common benefit of all creditors.

4. That this Court erroneously determined the present case for the reason that its adjudication makes a discrimination, which will be detrimental to the interests of business men of the country without just cause, in the following particulars, among others that might be mentioned:

(1) A solvent debtor, with frozen assets, will be unable to prevent bankruptcy, which some regard as akin to disgrace, if any one of his creditors becomes antagonistic.

(2) One creditor of a debtor can block the efforts of the balance of creditors to conserve the debtor's assets for the common benefit of all by a receivership in equity and, at the same time retain the debtor's liability for any deficiency after distribution of the funds realized from administration of his business and sale of his assets.

(3) If A is doing business as an individual and B is doing business as a corporation, B will have a remedy in a court of equity, with its attendant advantages, that will not be available to A because of a legal technicality, which A cannot avoid through a legal change of status made in good faith.

(4) Every receivership by consent will be subject to disruption on the ground that it was instituted for the purpose of hindering and delaying creditors fraudulently, notwithstanding the highest good faith is exercised by the debtor and by the creditors participating therein, and petitioning creditors, and the receiver, will be subject to liability to any non-assenting creditor, although wholly innocent of any intent to hinder or delay any creditor in a fraudulent manner.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Circuit Court of Appeals for the Third Circuit be, upon further consideration, affirmed.

Respectfully submitted,

SIDNEY E. SMITH,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I, Sidney E. Smith, counsel for the petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

SIDNEY E. SMITH,
Counsel for Petitioners.

BRIEF OF ARGUMENT.

I.

The opinion filed by Justice CARDOZA in this case refers to no facts appearing from the record which contradict the two facts therein appearing and which, in the absence of anything else, should control the decision. These facts are that the primary purpose of the formation of this corporation was to carry on in corporate form the business which Robinson had theretofore carried on; and, that when Robinson formed the corporation, he was solvent to an ample degree. This being so, it is believed that the other findings of fact made by the Court in its opinion must be founded on what the Court has termed "admissions of counsel". If the latter is a fact, the cause has been erroneously determined through the fault of counsel and by reason of some misleading or misinforming statements made by him during the argument. Counsel is, of course, without doubt that whatever statements he made justified the inferences and conclusions drawn by the Court, as such statements were understood by the Court. He feels it incumbent upon him, however, to state to the Court that within a few minutes after resumption of argument of this case, subsequent to the luncheon recess, he became ill and although he continued and finished the argument, he has no clear recollection of making statements such as apparently were made by him. He does say to the Court that whatever was the language he used which carried to the Court the impressions as set forth in the opinion, such language was inadvertent or was in such form as to give the Court a totally incorrect result of what was intended to be said, or was in such form that it was misunderstood by the Court. Any language used by him was not intended to be, or to be construed as, an admission that (a) Robinson's actions were the result of a desire to find a device whereby his business might go on

and the importunate be held at bay; (b) that the sole purpose of the conveyance was to divest Robinson of his title and put it in such form and place that levies would be averted; (c) that the conveyance to the corporation was a part and parcel of a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design; (d) that the corporation was created for the very purpose of being sued; (e) that the corporation was brought into being by co-operation with friendly creditors for the purpose of delaying other creditors; (f) that the purpose and reason of the receivership was not to administer the assets of a corporation legitimately conceived but was to hinder and delay creditors. If counsel made such a statement it was contrary to the actual facts.

The actual and full facts of this transaction are not of record. The petitioner chose in the origin of the proceedings to have the question raised by him passed upon by the court below under the condition of the record as it existed upon the filing of the petition and of the answer of the receivers. The actual fact of the situation and the intent of counsel at the argument was to so state (although he appears to have been unfortunate in the use of words), that the primary purpose of the formation of the corporation was to continue in corporate form the business of Robinson and that the desire of practically everybody concerned was to avoid receivership or other adverse proceedings. This could have been demonstrated, and can be demonstrated, by the testimony of the great majority of creditors existing at the time, including not only merchandise but bank creditors in the City of Philadelphia.

It is fully realized that the foregoing statement at this time, with its effect of contradicting or withdrawing such language as may have been used at the oral argument, and upon which the Court based its findings of facts, is readily susceptible to the view that it is an afterthought

or is because of a dishonest desire to avoid the consequences of an act.

This Court does not decide cases by conjecture or by reason of suspicion, and it is felt that the only manner in which the Court could have reached its conclusions was some misleading or misinforming statement by counsel and it is felt therefore that it is the duty of counsel to lay the matter before the Court. Not the least of the reasons for this is that by the form of the decree the petitioner is relieved from establishing the facts by reason of which he asked permission to go before a jury, and it also deprives the respondents of an opportunity to show the actually existing conditions in the case.

II.

Aside from the foregoing, it is submitted, with the utmost respect, that the Court in its opinion went beyond the issues which were before it on the pleadings, and that the order made is erroneous. The decree of the Court is much wider in its scope than the prayer of the petition. The petitioner did not raise the question of the validity of the receivership as an entirety. Such question does not appear among the specifications of error. The petitioner was apparently of the opinion that the proceeding as an entirety was proper and expressly disclaimed any desire to test the validity thereof (Petitioner's Brief p. 16). He sought only to have a decree entered which would permit him to have a jury pass on his right to recover from the assets in the hands of the receivers the amount due him on the judgment he had obtained against Robinson individually. The entire argument of the petitioner was based on the ground that Robinson had committed a fraud as to the petitioner alone by the conveyance of the assets and that the receivership, while not a part of the primary fraudulent act, was a device adopted by Robinson to prevent attack on the fraud which petitioner claimed Robinson had

practiced as against him. The brief on behalf of respondents was directed entirely to this point. It has been, therefore, considered proper to raise this question in the petition for rehearing and to discuss it in this brief.

In the discussion, it will be assumed that the facts were as the Court has found them. The Court will, of course, not construe this assumption as a withdrawal of the statements made in the first part of this brief as to the actual facts.

Proceeding on this line, it is respectfully submitted that the Court was in error in reaching its conclusion that the formation of the corporation and the conveyance of the assets to the corporation were fraudulent in law and that the receivership should also be condemned as fraudulent.

The Court has found that there was not *intentional* fraud present. Its decree is based on the ruling that the conveyance and the receivership were fraudulent in law because they had a unity of plan to further a purpose to divest the debtor of his title so that levies could be averted. This is held to be contrary to the statute of Elizabeth and the Uniform Fraudulent Conveyance Act of the State of Pennsylvania; that as a consequence the conveyance to the corporation was voidable and that therefore the receivership must share the same fate.

(a)

THE CONVEYANCE BY ROBINSON WAS NOT FRAUDULENT UNDER THE LAWS OF THE STATE OF PENNSYLVANIA.

It is admitted by the petitioner that at the time the conveyance was made, and afterward, Robinson was amply solvent. Therefore, the only section under which this transaction could come is Section 7 of the Uniform Fraudulent Conveyance Act of the State of Pennsylvania (Act

of May 21, 1921, No. 379, P. L. 1045-1047; 39 PS Section 357), referred to by the Court, and the statute of 13th Elizabeth.

Section 7 of the Uniform Fraudulent Conveyance Act provides:

> "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

In Love v. Clayton et al., 287 Pa. 205, 215, a committee of creditors of a corporation which was in financial trouble entered into an agreement with the company by which the committee secured the control of the corporation and its assets through stock transfers. This was done for the purpose of continuing its business or disposing of its property for the benefit of creditors. It was held that the agreement was in effect an assignment for the benefit of creditors and therefore valid. Mr. Justice KEPHART said, inter alia:

> ". . .courts will seize any opportunity to strike down such a transaction where fraud is intended, as a violation of the statute. There must be an intent to delay, hinder and defraud creditors. In the present case, take the entire series of transactions. It was not a transfer to pay those who signed, but it set up a scheme whereby 'all' creditors would be paid."

In York County Bank v. Carter, 38 Pa. 446, 454, partners, heavily indebted, transferred their entire property to another person in consideration of the satisfaction of his claim against them and his agreement to pay the balance of the purchase money in discharge of other partnership debts. It was held that the transaction was not void be-

cause certain creditors were preferred, no intent to hinder, delay or defraud the others appearing. Mr. Justice STRONG said, inter alia:

> "The statute 13 Eliz. is aimed only at intended fraud. . . . Other creditors may be delayed and hindered, but 'not in a fraudulent manner,' as was said by Tilghman, C. J., in Wilt v. Franklin, 1 Binn. 514."

In Wilt v. Franklin, 1 Binn. (Pa.) 502, 513, 515, the conveyance of a debtor's assets to a trustee for the purpose of putting his creditors on an equal footing was sustained against a judgment creditor. That creditor claimed that the transfer was fraudulent under the statute 13 Elizabeth. Mr. Chief Justice TILGHMAN said:

> "The statute of 13 Eliz. c. 5 (the provisions of which go no further than the common law as now understood) never had it in contemplation to invalidate a fair transaction. It was made to avoid fraudulent conveyances, intended for the purpose of defeating, hindering, or delaying creditors of their just debts . . . It may be objected, that this case comes within the words of the statute, because Wilt has been hindered, delayed, and in part defeated, by this deed. It is true he has been delayed and partly defeated, but not in a fraudulent manner. We must give the statute a reasonable construction."

These cases have been cited, followed, and their rulings have become the settled law in Pennsylvania.

> Lippincott v. Barker, 2 Binn. 174, 183, 184;
> M'Allister v. Marshall, 6 Binn. 338, 347;
> M'Clurg v. Lecky, 3 P. & W. 83, 91;
> The York County Bank v. Carter, 38 Pa. 446, 453;
> Bentz v. Rocky, 69 Pa. 71, 76, 77;
> Lake Shore Banking Co. v. Fuller, 110 Pa. 156, 162, 163.

The principle laid down in the Pennsylvania cases above cited was undoubtedly carried into Section 7 of the Uniform Fraudulent Conveyance Act because that section specifically provides that there must be an "actual intent, as distinguished from intent presumed at law, to hinder, delay or defraud".

It is respectfully submitted that in disposing of the instant case this Court has overlooked the clear construction which the Uniform Fraudulent Conveyance Act of the State of Pennsylvania and the statute of 13th Elizabeth have received by the highest court of the State of Pennsylvania, and above set forth, and has overlooked that such construction has established by the highest court of the State of Pennsylvania a rule of property, and that this Court should in the instant case accept and follow such construction.

In Sumner et al. v. Hicks et al., 2 Black 532, 533, 534, it was held that in cases involving the construction of a State statute relating to fraudulent conveyances this Court is bound to follow the judgment of the highest judicial authority of the State. Mr. Justice SWAYNE said:

> "The Statute of Wisconsin upon the subject of fraudulent conveyances is substantially the same with that of the 13th of Elizabeth, chapter 5, ... In cases like this, involving the construction of a State statute, this Court is governed by the judgment of the highest judicial authority of the State."

In Peters v. Bain, 133 U. S. 670, 686, involving the Virginia statute, Mr. Chief Justice FULLER said:

> "In controversies arising under this statute, involving, as they do, the rights of creditors locally, and a rule of property, we accept the conclusions of the highest judicial tribunal of the State as controlling.

Jaffray v. McGehee, 107 U. S. 361, 364; Lloyd v. Fulton, 91 U. S. 479, 485; Allen v. Massey, 17 Wall. 351."

See also:

South Branch Lumber Co. v. Ott, 142 U. S. 622, 627, 628;
Bamberger v. Schoolfield, 160 U. S. 149, 159.

(b)

THERE WAS NOTHING UNLAWFUL OR IMPROPER IN THE APPLICATION FOR THE APPOINTMENT OF RECEIVERS FOLLOWING THE FORMATION OF THE CORPORATION.

The receivership in this case is condemned by the Court for the stated reason that the Court was of the opinion that it was part and parcel of a scheme (of which scheme the formation of the corporation and the conveyance to it of the assets were the other elements) whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design to, as the Court says, "build up obstructions" that would hold his creditors at bay.

The formation of the corporation and the conveyance to the corporation could not have been in the mind of the Court as operating in any way to obstruct and delay creditors because it is clear that immediately upon the formation of the corporation it expressly assumed, as part of the consideration for the transfer to it of Robinson's assets, full liability for every one of the debts of the business. The debt of this petitioner was expressly assumed by name and amount, as were all of the other debts. Therefore, if this petitioner felt that the substitute for these assets which Robinson received, to wit, all of the stock of the corporation which had a clear value of $100,000., was too intangible to pursue, he was in no way jeopardized because he had as full and complete access to the tangible assets as he would

have had if they had remained in the name of Robinson individually. Certainly, in no way could the formation of the corporation and the transfer to it of the assets have removed the assets from the danger of levies and there could be no finding of fraud by reason of this part of the transaction, actual or implied. Apparently, therefore, the attitude of the Court arose from the fact that the application for the receivership followed so closely the formation of the corporation. The Court does not refer to the intervening occurrences which are set forth in the bill as making necessary some action by Robinson to conserve his assets.

There should be kept in mind constantly the admitted fact that at all times Robinson was amply solvent. We have, therefore, an individual possessed of ample property, but for some reason unable to meet a maturing obligation and demand of one of his creditors. This creditor, antagonistic, threatened suit. The debtor had one of two courses open to him; first, to remain quiescent, and, being wholly and admittedly solvent, wait until the action of such creditor had compelled or caused similar action by other creditors and thus changing his position to that of bankrupt; second, to take a fair procedure and endeavor to conserve his assets and preserve his solvency for the benefit first of his creditors and second, for himself. It seems hardly necessary to suggest to the Court that where a man is in a "frozen" condition his creditors would not stand idly by and allow one of their number to proceed to recover the full amount of his claim no matter at what cost or sacrifice.

To repeat, Robinson was amply solvent. He was conscious of the "frozen" condition of his assets and decided it was necessary or desirable to take steps to protect his assets against sacrifice and for the benefit of his creditors and himself because one or two of his creditors were antagonistic; for this reason he formed the corporation in order that if necessity arose, as a result of that antagonism,

or otherwise, resort could be had to the Federal courts for the purpose of providing for the conservation of his assets, and, if the event proved it necessary, for an equal distribution among his creditors under the most advantageous conditions. Such action was not an unworthy one. The language of Justice BLACK in Covanhoven v. Hart, 21 Pa. 495, 501, is very applicable. There, in sustaining a conveyance by a debtor in failing circumstances, Justice BLACK said:

> "We are not permitted to assign a bad motive to an act which is not wrong in itself or in its necessary consequences. . . . The act being right, no secret feeling can change its character. Indeed it may be said that the motive which results in proper action cannot be a bad one."

The object of any application to a court of equity for the appointment of receivers, and the effect of the appointment of receivers under such application, can be only, and can have no other effect than, to "hinder and delay creditors". Such result is undoubtedly an obstruction to creditors, but this obstruction is warranted and is authorized by the law under proper conditions. Wisely and properly used it can have no other than a beneficial effect. It is respectfully suggested that in order for any action in the instant case to amount to an "obstruction" worthy of condemnation there should appear a condition which would have improperly enabled the debtor to hold his creditors at bay through some control exercised by him, directly or indirectly, of his assets, and for some improper purpose. In placing the assets in the hands of the Court, and under its absolute control, this debtor was divested of all voice in the matter. It is true the action prevented the antagonistic creditor from enforcing his normal remedies, but such intent and such result is what justifies the exercise of the power of the Court to appoint receivers. The assets are surrendered by the debtor for the equal benefit of all cred-

itors. That benefit is obtained either by immediate liquidation of the assets and their distribution equally among the creditors, or, under the power and discretion vested in the Chancellor, the assets are conserved and managed. All of this, however, is absolutely beyond the control of the debtor and is solely and entirely in the hands of the Court. In the exercise of its discretion the court, is guided, if guided at all, solely by the wishes of the creditors, and not by the opposing wishes of the debtor if there is a conflict. Such action does not warrant the criticism contained in the opinion of Judge BOURQUIN in another case (59 F. (2d) 220), that "If the scheme be furthered by the cooperation of, say, an amiable court, what is it but employment of the judicial club to beat off and hold up creditors until, wearied, they settle with or wait the pleasure of the debtor's executive vice-president receiver shielded by the judicial gown?" We do not believe that this Court will take the position that there is an inclination among the District Court judges of this country to fail in the performance of their duty.

In furtherance of the contention made herein, the attention of the Court is respectfully called to the fact that if it had been in the mind of Robinson only to find a device whereby he could continue in business and hold off his creditors; to remove his assets from the danger of levy, or as the Court has said, to attempt "a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design", he could have accomplished everything that is condemned in the instant case by filing a voluntary petition in bankruptcy.

It is provided in USCA, tit. 11, Section 22, inter alia:

"(a) Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this title as a voluntary bankrupt."

In Hargadine-McKittrick Dry Goods Co., 239 Fed. 155,

which was reversed in 244 Fed. 719, it was held that it is not essential that a petitioner for voluntary bankruptcy be insolvent. A certiorari to this Court was denied, 245 U. S. 667.

See also:

People's National Bank v. Foltz, 25 F. (2d) 295 (CCA 6th).

USCA, tit. 11, Section 11, provides, inter alia:

"The courts of bankruptcy . . . are invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, . . . to . . . (5) authorize the business of bankrupts to be conducted for limited periods by receivers, . . ., if necessary in the best interests of the estates, . . ."

The question of continuing the bankrupt's business through a receiver in bankruptcy is discretionary and the abuse of such discretion must plainly appear for the exercise of such discretion to amount to error.

In re Myley Electrical Supply Co., 287 Fed. 524 (CCA 2nd).

It is therefore respectfully suggested that the actions taken in this case were not worthy of condemnation. They were for the benefit of creditors rather than their detriment. Except for the fact of undoubted solvency, Robinson acted to his own detriment in proceeding in this manner. By receivership in equity he relieved himself of nothing, because neither he nor the corporation would be released from any of the existing indebtedness if sufficient funds were not realized to pay creditors. If it had been his intent to improperly use judicial process in order with

unfair motives to hinder or delay his creditors the obvious method would have been for him to file a petition in bankruptcy. If he had done this, "the business might go on and the importunate be held at bay"; he would have had the opportunity to try out any thought "that if suits can be staved off for a season he will weather a financial storm, and pay his debts in full", and with the ultimate result that if he found himself mistaken he would be relieved of further liability.

Nor should his action in forming the corporation under the laws of the State of Delaware be considered as having been done with an ulterior motive. If any wrongful motive was under consideration it would have been just as easy for him to form his corporation under the laws of the State of Pennsylvania and have non-resident creditors become parties to the Bill for the Receivership. As far as concerns the legal status of the action in connection with the jurisdiction, this would seem to be settled by the case of Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab Company, 276 U. S. 518, 524, 525. In that case there was an existing controversy between two corporations chartered under the laws of the same State. It was an established fact that the desire on the part of one of the parties was to have the controversy determined in a Federal court and for that purpose a new corporation was formed and the property of the first corporation transferred to it. Mr. Justice BUTLER in holding that there was nothing fraudulent in this under Section 37 of the Judicial Code said:

"The motives which induced the creation of respondent to become a successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In those

circumstances, courts will not inquire into motives when deciding concerning their jurisdiction."

If the respondent in the case above cited was warranted in bringing into existence a condition or status from which it gained the right to have recourse to a Federal court, when under its prior condition or status no such right existed, surely an individual who is solvent, but who sees in the distance danger to his financial structure, has the right to change his status in such manner that if the protection of his creditors and of himself should make it seem desirable, recourse to a court having fuller powers of administration might be had—particularly where there is no actual fraud involved.

(c)

THE RULING IN THIS CASE PRACTICALLY DESTROYS THE REMEDY OF CONSENT RECEIVERSHIPS IN EQUITY.

The Court has stated that there was no actual fraud in the instant case but that the actions taken were due to a mistaken idea of counsel and client as to the propriety of the procedure. Continuing to assume that the facts are as the Court found them, it is respectfully urged that the Court consider the necessity and desirability of reversing its finding.

If the facts in this case had disclosed an actual intent to defraud the creditors, or, to quote Judge BOURQUIN again, "to beat off and hold up creditors until . . . they settle with or wait the pleasure of" Robinson; if there were any facts that indicated an effort to deprive creditors of their honest dues and their right to resort to the assets, there could be no sound reason for differing from the conclusions reached by the Court. It is respectfully suggested, however, that it is of very considerable importance that the Court should draw a distinct and clear line between an

application for the appointment of a receiver, or steps taken to that end, pointing to an unfair or dishonest motive or result, of which there are unquestionably instances in the records, and one where there is every evidence of the highest good faith and not a scintilla of evidence to the contrary; one where the only result can be a benefit to creditors before any benefit can accrue to the author of the application.

There is a decided difference between an action intended to withdraw assets from those who are entitled to the benefit of them, and an action intended to prevent, and having the result of preventing, an antagonistic creditor from pursuing the ordinary remedies at law and thus causing a wreck of a solvent debtor. All of us undoubtedly have only too full knowledge that for several years past there have been tremendous numbers of individuals and corporations in a condition of solvency to a considerable degree if the intrinsic and fair value of their assets were considered, but who, because of money stringency, have not been able to promptly meet accruing indebtedness. Forced liquidations at any time, and certainly under the conditions that have existed in this country for several years back, inevitably result in disasters and losses in the business and commercial world. That wherever possible such disasters should be avoided goes without saying. That everywhere in this country effort has been made and is being made to save such disasters is common knowledge. For this purpose on countless occasions, resort has been had to receiverships under the control of a court of equity. This Court has said that receiverships in equity for the purpose of conservation have their place if their functions are properly exercised. It is thought safe to say that hundreds of receiverships are now pending and functioning under the control of the Federal courts in this country. It is with all seriousness and after much reflection that it is urged upon the Court that the ruling in the instant case, if per-

mitted to stand, will have the effect of destroying this commonly adopted method of attempting to conserve a solvent debtor's assets, and that the only recourse to a debtor who is embarrassed from lack of ready funds, and who is threatened by an antagonistic creditor, and whether he is solvent or insolvent, will be bankruptcy.

A consent receivership cannot be had unless there is an agreement between the debtor and his creditors that the proceeding be instituted. The appointment of receivers may be to conserve the assets and save them from sacrifice, but its unavoidable effect, and its undoubted intent in its conception, is to delay creditors who are antagonistic and insist on sacrifice of assets by forced liquidation. Any such receivership would, therefore, be subject to attack by any dissenting creditor on the ground that the proceedings were instituted for the purpose of hindering and delaying creditors, and, therefore, was fraudulent in law, notwithstanding the highest good faith had been exercised by the debtor and the creditors participating therein. If the receivership was asked for on behalf of a corporation, the proximity in point of time between the granting of the charter and the application for the receivership would not be a controlling factor in the case, because if the fact that the purpose of the proceedings is the "hindrance and delay of creditors" is fatal to the action it would make no difference whether the corporation was three days old or three years old.

A necessary consequence, therefore, is that no consent receivership could be safely asked for without an agreement in advance between the debtor and every one of his creditors. A necessary element of the application for the appointment is that loss is threatened by reason of the action of some creditors and the very fact of an agreement by all of the creditors would thus remove a jurisdictional element.

By the ruling in the instant case, the wishes of the entire body of creditors may be defeated by one antagonistic creditor—if a debtor was solvent a hundred times over

but handicapped by "frozen assets", with the balance of his creditors willing to join in the saving of the situation, the one antagonistic creditor could force the debtor to inactivity until the antagonistic creditor had pursued the debtor so far that the only recourse would be bankruptcy.

It may be said that the effect of the ruling herein will be to render dangerous the participation of creditors in a bankruptcy proceeding. If the opinion is pursued to its logical end the ruling herein would give a dissenting creditor in a bankruptcy proceeding the right to be exempt from the effect of the bankruptcy on the charge that the bankrupt had resorted to the bankruptcy proceedings not in good faith but as "part and parcel of a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design"—this whether it was a voluntary petition by a solvent debtor or whether it was an involuntary petition by creditors. The Court has held that the plaintiff McLean was a party to Robinson's actions although it does not point out whether it means that McLean's activity began before the filing of the bill for a receiver. The same conclusions could be drawn as to a petition in bankruptcy as have been drawn in connection with this transaction.

We have the well established principle that persons participating in an application for a receivership with actual fraudulent intent incur liability. Whether that principle might be extended to cover a case where there was legal fraud only is a matter of doubt, but the possibility of being involved in litigation concerning such a question is presented to any creditor who joins. It is suggested to the Court with all respect that it has paid more attention to the form than to the substance of this transaction. The result of the position taken by the Court is that if two men were carrying on identical businesses, one in corporate form and the other as an individual, although the ownership of each in his respective business was complete and entire, the first could avail himself of the opportunity to do what

Robinson has done here without criticism even though the intent and effect of his action would be exactly the intent and effect of the action of Robinson; the only difference being that one had gone through the formality of obtaining a charter from some State and the other had failed so to do.

If the foregoing analysis of the effect of the opinion in this case is correct, a man accepting the appointment as a receiver would act at his own peril in the event that it was shown, as it can be shown in any consent receivership, that the receivership was conceived for the purpose of delaying the enforcement by creditors of their claims so that the assets of a frozen but admittedly solvent debtor may be conserved and saved from sacrifice. The necessary consequence of this is that it would have to be ascertained whether all the creditors were satisfied because if there were a number of non-assenting ones the peril under which such receiver would act would deter men of ability and responsibility from accepting the appointment.

We are all aware that abuses have crept into the administration of equity receiverships. We are aware that in some instances these abuses have been great. It is suggested, however, that in comparison to the great total of equity receiverships, such abuses make up a very small proportion. It is ventured to say that the great proportion of them are administered honestly and properly under the supervision by the courts in the performance of their duty; that the result is one which should be encouraged rather than discouraged. Wherever corrective steps can be taken they should, of course, be taken. The power to conserve and manage the assets of a solvent debtor so that they shall not be depreciated unnecessarily in value is one of great importance, not only to the debtor and to his creditors but to the communities at large, and it is most earnestly urged that because in some cases unfair or unworthy motives or actions are present or are pursued no reason for abandoning the whole system is presented. Without

intending to be in the least impertinent, we venture to commend to the attention of this Court the statement of Judge PARKER of the Untied States Court of Appeals for the Fourth Circuit, "There is no sense in burning down your house to get rid of the rats".

It is therefore most respectfully submitted that for the reasons in law given above, and as a matter of sound and vital public policy, the ruling made in the instant case should be withdrawn, a rehearing granted, and the decree of the Circuit Court of Appeals affirmed.

Respectfully submitted,

SIDNEY E. SMITH,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 40.—October Term, 1932.

Bernard L. Shapiro, Petitioner,
vs.
Horace B. Wilgus and David Bachman, Receivers of Miller Robinson Company, Respondents.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

[December 5, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner, a judgment creditor of Herbert P. Robinson, made application in due form to a United States District Court in Pennsylvania praying that leave be granted him to levy an execution upon property in the possession of receivers appointed by that court. An order refusing such leave was affirmed by the Circuit Court of Appeals for the third circuit. 55 F. (2d) 234. The case is here on certiorari.

From the record and the admissions of counsel these facts appear. Herbert P. Robinson was engaged in business in Philadelphia as a dealer in lumber. He was unable to pay his debts as they matured, but he believed that he would be able to pay them in full if his creditors were lenient. Indeed he looked for a surplus of $100,000 if the business went on under the fostering care of a receiver. Most of the creditors were willing to give him time. Two creditors, including the petitioner, were unwilling, and threatened immediate suit. Thus pressed, the debtor cast about for a device whereby the business might go on and the importunate be held at bay. He had to reckon with obstructions erected by the local law. The law of Pennsylvania does not permit the appointment of a receiver for a business conducted by an individual as distinguished from one conducted by a corporation or a partnership. *Hogsatt* v. *Thompson,* 258 Pa. St. 85. To make such remedies available there was need to take the title out of Robinson and put it somewhere else. The act responded to the need. On

January 9, 1931, the debtor brought about the formation of a Delaware corporation, the Miller Robinson Company. On the same day he made a conveyance to this company of all his property, real and personal, receiving in return substantially all the shares of stock and a covenant by the grantee to assume the payment of the debts. Three days later, on January 12, 1931, in conjunction with a simple contract creditor, he brought suit against the Delaware corporation in the federal court, invoking the jurisdiction of that court on the ground of diversity of citizenship. The bill of complaint alleged that creditors were pressing for immediate payment; that one had entered suit and was about to proceed to judgment; that the levy of attachments and executions would ruin the good will and dissipate the assets; and that the business, if protected from the suits of creditors and continued without disturbance could be made to pay the debts and yield a surplus of $100,000 for the benefit of stockholders. To accomplish these ends there was a prayer for the appointment of receivers with an accompanying injunction. The corporation filed an answer admitting all the averments of the bill and joining in the prayer. A decree, entered the same day, appointed receivers as prayed for in the complaint, and enjoined attachments and executions unless permitted by the court. Four days thereafter, on January 16, 1931, the petitioner began suit against Robinson in the Court of Common Pleas, and on February 4, 1931, recovered a judgment against his debtor for $1,007.65 upon a cause of action for money loaned. On February 26, 1931, he submitted a petition to the United States District Court in which he charged that the conveyance from Robinson to the corporation and the ensuing receivership were parts of a single scheme to hinder and delay creditors in their lawful suits and remedies, and he prayed that he be permitted to issue a writ of *fieri facias* against the chattels in the possession of the receivers and to sell them so far as necessary for the satisfaction of his judgment. The petition was denied, and the denial affirmed upon appeal.

The conveyance and the receivership are fraudulent in law as against non-assenting creditors. They have the unity of a common plan, each stage of the transaction drawing color and significance from the quality of the other; but, for convenience, they will be considered in order of time as if they stood apart. The sole

purpose of the conveyance was to divest the debtor of his title and put it in such a form and place that levies would be averted. The petition to issue execution and the answer by the receivers leave the purpose hardly doubtful. Whatever fragment of doubt might otherwise be left is dispelled by the admissions of counsel on the argument before us. One cannot read the opinion of the Court of Appeals without seeing very clearly that like admissions must have been made upon the argument there. After a recital of the facts the court stated in substance that the aim of the debtor was to prevent the disruption of the business at the suit of hostile creditors and to cause the assets to be nursed for the benefit of all concerned. Perceiving that aim and indeed even declaring it, the court did not condemn it, but found it fair and lawful. In this approval of a purpose which has been condemned in Anglo-American law since the Statute of Elizabeth (13 Eliz., ch. 5), there is a misconception of the privileges and liberties vouchsafed to an embarrassed debtor. A conveyance is illegal if made with an intent to defraud the creditors of the grantor, but equally it is illegal if made with an intent to hinder and delay them. Many an embarrassed debtor holds the genuine belief that if suits can be staved off for a season, he will weather a financial storm, and pay his debts in full. *Means* v. *Dowd*, 128 U. S. 273, 281. The belief, even though well founded, does not clothe him with a privilege to build up obstructions that will hold his creditors at bay. This is true in Pennsylvania under the Uniform Fraudulent Conveyance Act, which became a law in that state in 1921. Purdon's Pennsylvania Digest, Title 39, § 357. It is true under the Statute of Elizabeth (13 Eliz., ch. 5) which, in any case not covered by the later act, is still the governing rule. Purdon's Pennsylvania Digest, Title 39, § 361; *McKibbin* v. *Martin*, 64 Pa. St. 352, 356; *Stern's Appeal*, 64 Pa. St. 447, 450. Tested by either act, this conveyance may not stand. *Hogsatt* v. *Thompson, supra; Montgomery Web Co.* v. *Dienelt*, 133 Pa. St. 585; *Atlas Portland Cement Co.* v. *American Brick and Clay Co.*, 280 Pa. St. 449; *In re Ellerson Co.*, 174 Fed. 859, affirmed 183 Fed. 715; *Kimball* v. *Thompson*, 4 Cush. 441, 446; *Dearing* v. *McKinnon Dash Co.*, 165 N. Y. 78; *Means* v. *Dowd, supra.*

The conveyance to the corporation being voidable because fraudulent in law, the receivership must share its fate. It was part and

parcel of a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design. *Harkin* v. *Brundage,* 276 U. S. 36; *Decker* v. *Decker,* 108 N. Y. 128, 135. The design would have been ineffective if the debtor had been suffered to keep the business for himself. *Hogsatt* v. *Thompson, supra.* It did not gain validity when he transferred the business to another with a capacity for obstruction believed to be greater than his own. The end and aim of this receivership was not to administer the assets of a corporation legitimately conceived for a normal business purpose and functioning or designed to function according to normal business methods. What was in view was very different. A corporation created three days before the suit for the very purpose of being sued was to be interposed between its author and the creditors pursuing him, with a restraining order of the court to give check to the pursuers. We do not need to determine what remedies are available for the conservation of the assets when a corporation has been brought into existence to serve legitimate and normal ends. Ordinarily a creditor who seeks the appointment of receivers must reduce his claim to judgment and exhaust his remedy at law. The Uniform Fraudulent Conveyance Act may have relaxed that requirement in many of the states (Purdon's Pennsylvania Digest, Title 39, §§ 351, 359, 360; cf. New York Debtor and Creditor Law, Article 10; Consol. Laws, ch. 12; *American Surety Co.* v. *Connor,* 251 N. Y. 1), but the rule in the federal courts remains what it has always been. *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 497; *Scott* v. *Nealy,* 140 U. S. 106; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 379; *Matthews* v. *Rodgers,* 284 U. S. 521, 529. True indeed it is that receivers have at times been appointed even by federal courts at the suit of simple contract creditors if the defendant was willing to waive the irregularity and to consent to the decree. This is done not infrequently where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good. *Re Metropolitan Railway Receivership,* 208 U. S. 109, 111. It has been done at times, though the public good was not involved, where legitimate private interests might otherwise have suffered harm. *United States* v. *Butterworth Co.,* 269 U. S. 504, 513; *Krugsport Press* v. *Brief English Systems,* 54 F. (2d) 500; *Harkin* v. *Brundage, supra,* p. 52. We have given warning more

than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 345; *Harkin* v. *Brundage, supra.* Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality. It is one thing for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380. Whatever hindrance and delay of suitors is involved in such a remedy may then be incidental and subsidiary. It is another thing for a debtor, coöperating with friendly creditors, to bring the corporation into being with the hindrance and delay of suitors the very aim of its existence. The power to intervene before the legal remedy is exhausted is misused when it is exercised in aid of such a purpose. Only exemplary motives and scrupulous good faith will wake it into action.

The receivership decree assailed upon this record does not answer to that test. We have no thought in so holding to impute to counsel for the debtor or even to his client a willingness to participate in conduct known to be fraudulent. The candor with which the plan has been unfolded goes far to satisfy us, without more, that they acted in the genuine belief that what they planned was fair and lawful. Genuine the belief was, but mistaken it was also. Conduct and purpose have a quality imprinted on them by the law.

There remains a question of procedure. The prayer of the petitioner was that he be permitted to issue execution upon his judgment in the state court. Cf. *Wiswall* v. *Sampson*, 14 How. 52. If there had been any substantial doubt that the conveyance and the receivership were voidable obstructions, the federal court might have refused to permit the tangle to be unraveled in the courts of the state. It might have retained the controversy in its own grasp and made a decision for itself. But in truth there was no substantial doubt as to the quality of conveyance and receivership, no genuine issue to be tried. In such circumstances the petitioner was entitled to an order in the alternative either for the payment of his judgment out of the assets in the hands of the receivers or in default thereof for leave to issue execution. The refusal to grant relief in one or other of these forms is a departure from the bounds of any legitimate discretion which is not without redress.

The decree is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.